TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 265.

JOHN H. STONE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED APRIL 22, 1895.

(15,879.)

(15,879.)

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THE LAW ASSOCIATION —OF— PHILADELPHIA.

JOHN H. STONE, PLAINTIFF IN ERROR,

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a Endorsed.

Transcript of Record.

United States Circuit Court of Appeals for the Ninth Judicial Circuit, October Term, 1893.

JOHN H. STONE, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error. } No. 153.

Error to the district court of the United States for the district of Washington, eastern division.

Filed December 6, 1893.

F. D. MONCKTON, *Clerk.*

1 Be it remembered, that on the 13th day of May, 1892, there was duly filed in said district court of the United States for the district of Washington, eastern division, a complaint in words and figures as follows, to wit:

In the District Court of the United States for the District of Washington, Eastern Division, Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant. } Complaint.

The plaintiff complains of defendant, and for causes of action alleges:

I.

That during all the times hereinafter mentioned, the said plaintiff has been and is now the owner of the following-described lands, to wit:

The N. W. ¼ sec. 8, t'p 53 N., R. 3 west of the Boisé meridian; W. ½ N. E. ¼, W. ½ S. E. ¼ sec. 34, t'p 53 N., R. 3 W., B. M.; S. W. ¼ sec. 26, t'p 53 N., R. 3 W., B. M.; E. ½ N. E. ¼, E. ½ S. E. ¼ sec. 34, t'p 53 N., R. 3 W., B. M.; S. ½ S. E. ¼, S. ½ S. W. ¼ sec. 14, t'p 53 N., R. 3 W., B. M.; S. E. ¼ sec. 2, t'p 53 N., R. 3 W., B. M.; W.
2 ½ N. E. ¼, N. ½ S. E. ¼ sec. 22, t'p 53 N., R. 3 W., B. M.; N. E. ¼ sec. 20, t'p 53 N., R. 3 W., B. M.; S. E. ¼ sec. 8, t'p 53 N., R. 3 W., B. M.; N. W. ¼ sec. 22, t'p 53 N., R. 3 W., B. M.; E. ½ N. E. ¼ sec. 18, t'p 53 N., R. 3 W., B. M.; N. W. ¼ sec. 8, t'p 53 N., R. 3 W., B. M.; S. W. ¼ sec. 2, S. ½ sec. 4, N. E. ¼ sec. 14, E. ½ N. E. ¼ sec. 22, S. E. ¼ S. E. ¼ sec. 22, N. W. ¼ sec. 24, all being in t'p 53 N., R. 3 W., B. M.; N. ½ S. W. ¼, S. E. ¼ S. W. ¼, S. W. ¼ S. E. ¼ sec. 22, t'p 23 N., R. 3 W., B. M.; W. ½ N. W. ¼ sec. 2, t'p 51 N., R. 5 W., B. M.; N. W. ¼ sec. 12, t'p 53 N., R. 3 W., B. M.; W. ½ N. E. ¼, E. ½ N. W. ¼ sec. 18, t'p 53 N., R. 3 W., B. M.; E. ½ N. W. ¼ and lots 1

and 2, sec. 30, N. E. ¼ sec. 30, t'p 53 N., R. 3 W., B. M.; S. W. ¼ sec. 20, t'p 53 N., R. 3 W., B. M.; E. ½ N. E. ¼, S. E. ¼ S. E. ¼, and S. W. ¼ S. W. ¼, sec. 22, t'p 53 N., R. 3 W., B. M.

E. ½ N. E. ¼, E. ½ S. E. ¼ sec. 34, t'p 53 N., R. 3 W., B. M.; W. ½ N. E. ¼, W. ½ S. E. ¼ sec. 34, t'p 53 N., R. 3 W., B. M.; sec. 12; N. W. ¼ N. E. ¼ of S. W. ¼, sec. 18, N. W. ¼ sec. 24, t'p 53 N., R. 3 W., B. M.; secs. 6 and 18, t'p 54 N., R. 2 W., B. M.; N. E. ¼ sec. 4, N. E. ¼ sec. 14, N. ½ S. E. ¼ sec. 24, t'p 52 N., R. 4 W., B. M.; secs. 6, 8 and 18, W. ½ sec. 20, and the N. ½ S. W. ¼ sec. 30, t'p 53 N., R. 2 W., B. M.; E. ½ sec. 2, and S. E. ¼ sec. 22, and secs. 12, 14, 24, 26 and 34, t'p 54 N., R. 3 W., B. M.; E. ½ sec. 2, secs. 12, 14, 22, 26, 28, 30, 32 and 34, t'p 54 N., R. 3 W., B. M.; N. W. ¼ sec. 34, and secs. 6 and 18, t'p 52 N., R. 3 W., B. M.; S. E. ¼ sec. 12, t'p 53 N., R. 3 W., B. M.; E. ½ S. E. ¼ sec. 12, sec. 24, t'p 53 N., R. 3 W., B. M.; W. ½ N. W. ¼ sec. 18, and secs. 8 and 20, t'p 55 N., R. 2 W., B. M.; S. W. ¼ S. E. ¼, N. W. ¼ N. W. ¼ and S. E. ¼ sec. 34, t'p 53 N., R. 4 W., B. M.; S. E. ¼ and the N. E. ¼ sec. 12, t'p 53 N., R. 4 W., B. M.

3 S. E. ¼ sec. 14, S. W. ¼ sec. 28, N. ½ S. W. ¼ sec. 20, E. ½ N. E. ¼ sec. 22, t'p 53 N., R. 3 W., B. M.; N. ½ sec. 14, t'p 52 N., R. 4 W., B. M.; E. ½ S. W. ¼ and lots 3 and 4, sec. 18, t'p 53 N., R. 3 W., B. M.; N. ½ N. E. ¼, S. W. ¼ N. E. ¼, S. E. ¼ N. W. ¼ sec. 10, t'p 53 N., R. 3 W., B. M.; E. ½ N. E. ¼, E. ½, S. E. ¼ sec. 10, t'p 53 N., R. 3 W., B. M.

All of said lands lying and being in Kootenai county State of Idaho.

II.

That between August 1st, 1888, and November 1st, 1890, the said John H. Stone, the defendant, did unlawfully, wrongfully and wilfully cut from the said lands 77,441 trees and did thereafter, prior to the commencement of this action unlawfully, wrongfully and wilfully manufacture 69,766 of the said trees into railroad ties, making out of the same 280,539 railroad ties, and did then and there unlawfully, wrongfully and wilfully convert and dispose of the said railroad ties to his own use and benefit; and the said defendant did prior to the commencement of this action, unlawfully, wrongfully and wilfully convert and dispose of 7,675 of said trees to his own use and benefit, by selling the same to the Spokane Mill Company, a corporation under the laws of the State of Washington, doing business at Spokane, Washington, and thereafter, prior to the beginning of this suit, the said Spokane Mill Company, did unlawfully, wrongfully and wilfully manufacture said trees into lumber, to wit: into 15,312,175 feet of lumber.

III.

That the said 7,675 trees which were sold to the Spokane
4 Mill Company were, when standing, of the value of $1.00 per thousand feet; that the said trees after being severed from the soil, were of the value of $1.50 per thousand feet at the place at which they were severed; that the said trees at the place and time when they were delivered to the said defendant The Spo-

kane Mill Company, were of the value of $6.25 per thousand feet, and that the said trees after being made into lumber, as aforesaid, were of the value of $10.00 per thousand feet; and that the said 69,766 trees which were made into railroad ties were, when standing, of the value of 25 cents per thousand feet; and that the said trees after being severed from the soil were of the value of 50 cents per thousand feet, and the said trees after being made into ties as aforesaid, were of the value of 30 cents per railroad tie.

IV.

That at the time the said 69,766 trees were manufactured into railroad ties as aforesaid, and at the time the said 7,675 trees were sold to the Spokane Mill Company and manufactured into timber as aforesaid, the said ties and the said timber, and the said trees from which they were manufactured, belonged to the United States of America, and had been wilfully, wrongfully and unlawfully converted into said timber and ties.

V.

That the plaintiff was the owner of all of said logs out of which said ties were made when cut, as aforesaid, and was the owner of the same after it had been converted into ties; and the plaintiff was the owner of all of said logs which were manufactured into timber, as aforesaid, by the Spokane Mill Company, and was the owner of all of said timber after it was manufactured, as aforesaid, all of which said ties and timber the defendant, unlawfully, wrongfully and wilfully converted to his own use and benefit.

VI.

That said trees when converted into timber were of the reasonable value of $153,121.75, and that the trees when converted into railroad ties were of the value of $84,161.70.

Wherefore, plaintiff demands judgment against defendant for the sum of $237,283.45, and for costs and disbursements of this action.

P. H. WINSTON,
U. S. Attorney.

And afterwards, to wit, on the 31st day of May, 1892, there was duly filed in said court, in said cause, a demurrer to the complaint, in the words and figures as follows, to wit:

In the District Court of the United States, District of Washington, Eastern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant.

Demurrer to Complaint.

Now comes the above-named defendant and demurring to the complaint filed herein, assigns for grounds therefor the following:

6 I.

There is a misjoinder of causes of action in this:

That divers trespasses upon divers parcels of land are joined together as one cause of action, though they are in their nature several and distinct, and must have been committed, if at all, at different times, and each should be separately stated, and cannot be combined as one cause of action.

II.

The complaint is insufficient in its statement of facts to constitute a cause of action in this:

First. The complaint does not specify how many trees, or the value of the same, were cut or removed from any of the subdivisions of the land described.

Second. The complaint does not state that the lands from which the timber is alleged to have been cut and removed were in the possession of the plaintiff, nor that the same were public lands of the United States; and for aught that appears these lands were in the possession of lawful settlers.

Third. The trespass upon each subdivision is a separate act and a separate cause of action, and each should be separately stated in the complaint.

III.

The complaint fails to state the legal subdivisions of the lands as surveyed according to law, upon which the alleged trespasses were committed—the allegation of the townships and sections being insufficient to identify the trespasses complained of.

7 Wherefore, the defendant prays that this action may be dismissed.

McBRIDE & ALLEN,
Defendant's Attorneys.

We do hereby certify that in our opinion the foregoing demurrer is good in law, and is not filed for delay.

McBRIDE & ALLEN,
Defendant's Attorneys.

Service by copy admitted this 31st day of May, 1892.

P. H. WINSTON,
Plaintiff's Attorney.

And afterwards, to wit: on the 31st day of March, 1893, there was duly filed in said court, in said cause, the answer of the defendant, John H. Stone, in the words and figures as follows, to wit:

In the District Court of the United States, District of Washington, Eastern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant. } Answer.

Now comes the said defendant, John H. Stone, and answering the complaint of plaintiff filed herein:

First. Denies each and every allegation in the first subdivision of said complaint, except the allegation that the lands described therein are within the said county of Kootenai, State of Idaho.

8 Second. Denies each and every allegation in the second subdivision of said complaint, except as to the quantity of timber in feet alleged to have been sold to the said Spokane Mill Company, and alleges that of said amount more than thirteen million five hundred thousand feet were cut and taken exclusively from lands of the Northern Pacific Railroad Company.

Third. Denies each and every allegation in the third subdivision of the complaint.

Fourth. Denies each and every allegation contained in the fourth, fifth and sixth subdivisions of the complaint.

And now for a further defense to the said action, this defendant alleges—

That between the dates mentioned in the complaint, to wit, between the months of August, 1888, and November, 1890, he had contracts with various customers for supplies of railroad ties and timber for the manufacture of lumber at points along the line of the Northern Pacific railroad in the State of Washington, and adjacent to the region mentioned in the complaint; that he procured his supplies of timber for the purposes aforesaid from the lands embraced in the grant, to aid in the construction of the Northern Pacific railroad, made by acts of Congress passed for that purpose, and by contracts with said company; and that at no time did this defendant ever cut any timber on any land except such lands as belonged to said company.

9 The defendant admits that during said time he purchased from other parties, who delivered ties and timber suited for lumber on the railroad, both ties and timber not cut by himself, for which he paid the market price; but that all such ties and timber were either cut, as defendant alleges on information and belief, from the railroad lands aforesaid, or lawfully cut by the parties who sold and delivered the same to this defendant; and denies that any part or portion of the same were cut or taken from the lands of the United States, or unlawfully cut or taken from any lands.

This defendant further states that the said railroad ties which defendant so purchased from other parties, and which were not cut by himself, from the lands of said railroad company, were for the use of, and were used in the construction of the Spokane & Palouse Railway Company and the Central Washington Railway Company's railroads, respectively, both corporations being organized and constructing their roads under and in compliance with grants made *by*

them by the act of Congress of March 3, 1875, which authorized the use of timber, etc., for construction to be taken from the public lands of the United States, and that the taking complained of herein for such purpose was not unlawful or any trespass, but by authority of law.

Further answering to the complaint of plaintiff, this defendant for further defense to this action alleges:

That in the month of April, 1891, at a term of the United States district court, held at Boisé City, in the district of Idaho, whereat the Honorable James H. Beatty, United States district judge, presided, and Fremont Wood, Esq., was attorney of the United
10 States, a grand jury was regularly empaneled and sworn; that the said trespasses and wrongs complained of herein were then and there presented by said United States attorney to said grand jury for investigation, and such proceedings were then and there taken that the said grand jury found and returned into said court true bills of indictment, in which each and all of the wrongs and trespasses complained of herein were included, and the said defendant was charged thereby with the commission of an offense against the penal laws of the United States, forbidding the cutting or removal of timber from the lands of the United States.

On all the charges involving the acts of this defendant as set forth in the complaint filed herein, this defendant was upon said indictments afterwards in said court tried and acquitted upon trial before said court and jury, and the defendant was adjudged innocent and discharged therefrom by the judgment of said court, all of which this defendant will verify by the record thereof, and the judgment of said court, upon each and every other charges preferred against him as aforesaid was duly entered against said plaintiff in said proceedings, the issues therein being the same as are now presented in this action, and were each and all determined and adjudged in this defendant's behalf and against the plaintiff, all of which will appear by the record and proceedings of the court therein, which this defendant will produce.

Wherefore, this defendant alleges, that the issues tendered by the plaintiff herein have been heard, tried and adjudged for de-
11 fendant and against the plaintiff, by a court of competent jurisdiction, and that said judgment and determination preclude the maintenance of this suit.

Wherefore, defendant prays for judgment in his behalf, and for all proper relief.

McBRIDE & ALLEN,
Attorneys for Defendant.

STATE OF WASHINGTON, } ss:
County of Spokane. }

Defendant, John H. Stone, being first duly sworn, deposes as follows: I am the defendant in the above-entitled action; have heard the foregoing answer read and know its contents, and the same is true as I verily believe.

JOHN H. STONE.

Subscribed and sworn to before me this 31st day of March, 1893.

S. A. WELLS,
Notary Public, Residing at Spokane, Washington.

Service by copy admitted this April 1st, 1893.

[SEAL.] P. H. WINSTON,
By ALEX. M. WINSTON, *Clerk.*

And afterwards, to wit: on the 3d day of April, 1893, there was duly filed in said court in said cause a reply in the words and figures as follows, to wit:

In the District Court of the United States, District of Washington, Eastern Division.

12 THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant. } Reply.

And now comes the United States of America, by its attorney, P. H. Winston, and for reply to all the allegations contained in the answer herein, except the allegation contained in the last and separate further defense set forth in said answer, denies the same to be true, and as to the matter alleged in the separate and further defense in said answer contained, plaintiff demurs to the same for the reason that the facts are not, if true, sufficient to constitute in law a defense.

P. H. WINSTON,
U. S. Attorney.

Service accepted this 3d day of April, 1893.

Be it remembered, that on the 13th day of May, 1892, there was duly filed in said district court of the United States for the district of Washington, eastern division, a complaint in words and figures as follows, to wit:

In the District Court of the United States, District of Washington, Eastern Division, Ninth Circuit.

13 UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants. } Complaint.

Plaintiff complains of defendants, and for cause of action alleges:

I.

That the defendants were at the time of the wrong hereinafter complained of, a copartnership doing business at Spokane, under the name and style of the Spokane Fuel Company.

II.

That heretofore on November 1st, 1890, at Spokane county, within the division and district aforesaid, the plaintiff was the owner of, and was legally entitled to immediate possession of the following-described personal property, to wit: 3,545 cords of wood, the same having theretofore been made from trees unlawfully cut on the public lands of the United States, to wit: on the following public lands of the United States:

S. E. ¼ sec. 14, S. W. ¼ sec. 28, N. ½ and S. W. ¼ sec. 20, E. ½ N. E. ¼ sec. 22, t'p 53 N., R. 3 west of the Boisé meridian; N. ½ sec. 14, t'p 52 N., R. W. 4 W., B. M.; E. ½ S. W. ¼ and lots 3 and 4, sec. 13, t'p 53 N., R. 3 W., B. M.; N. ½ N. E. ¼, S. W. ¼ N. E. ¼, S. E. ¼ N. W. ¼ sec. 10, t'p 53 N., R. 3 W., B. M.; E. ½ N. E. ¼, E. ½ S. E. ¼ sec. 10, t'p 53 N., R. 3 W., B. M, all of said lands lying and being in the county of Kootenai, in the State of Idaho.

14 III.

That at the time said trees were cut from said lands out of which said wood was made, said lands were, and are now public lands of the United States.

IV.

That on the said 1st day of November, 1890, at Spokane county aforesaid, the said defendants being then and there unlawfully in possession of the said wood, unlawfully converted and disposed of the same to and for their own use and benefit.

V.

That at the time said wood was so unlawfully converted and disposed of by defendants, it was of the value of $14,180.00.

Wherefore, plaintiff demands judgment against defendants for said sum of $14,180.00, and for costs of suit.

P. H. WINSTON,
U. S. Attorney.

And afterwards, to wit: on the 4th day of August, 1892, there was filed in said court, in said cause, the answer of the defendant, Edward Noonan, in words and figures as follows, to wit:

UNITED STATES OF AMERICA:

In the District Court of the United States, District of Washington, Eastern Division, Ninth Circuit.

15 UNITED STATES OF AMERICA, Plaintiff,
vs
JOHN H. STONE, EDWARD NOONAN, W. G. Kegler, Doing Business as the Spokane Fuel Company, Defendants. } Answer of Noonan.

Now comes the defendant Edward Noonan, one of the defendants in the above-entitled action, and for this his separate answer to the plaintiff's complaint herein:

First. Denies that he has any knowledge or information sufficient to form a belief as to whether the lands described in plaintiff's complaint were or are public lands of the United States, or whether plaintiff was the owner or entitled to the possession of any wood cut therefrom.

Further answering, defendant denies each and every allegation in said complaint contained, excepting as hereinbefore specifically denied.

Wherefore, defendant demands judgment against plaintiff for his costs and disbursements herein.

JONES, BELT & QUINN,
Attorneys for Defendant Edward Noonan.

STATE OF WASHINGTON, } ss:
County of Whitman, }

Edward Noonan, being first duly sworn, deposes and says: That he is one of the defendants on the above-entitled action; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

E. NOONAN.

16 Subscribed and sworn to before me this 26th day of July, 1892.

W. H. LICHTY,
[SEAL.] *Notary Public for the State of Washington,*
Residing at Palouse, Washington.

Due service of the foregoing answer by a true copy thereof, is hereby admitted at Spokane, Washington, this 4th day of August, 1892.

P. H. WINSTON,
U. S. District Attorney.

And afterwards, to wit, on the 9th day of August, 1892, there was duly filed in said court, in said cause, the separate answer of the defendant, John H. Stone, in the words and figures as follows, to wit:

District Court of the United States, District of Washington, Eastern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants.

Now comes the said defendant, John H. Stone, and filing his separate answer and defense to this action alleges for his first defense—

That he was indicted upon a charge of cutting timber un-
17 lawfully from the same lands and premises, upon which the alleged trespasses complained of in this action are founded,

at the April term of the United States district court for the district of Idaho. That he was thereafter arrested thereon and appeared in said court. A copy of the indictment is hereto annexed and made part hereof, marked Exhibit "A." That such proceedings were afterwards had, a judgment was duly given and rendered in favor of the said defendant, and he has been fully acquitted and discharged of said offense and of said trespass thereby.

Wherefore defendant pleads the judgment of said court in full discharge of said cause of action and in bar of all right of action on account thereof.

For a further special defense this defendant denies that the persons named as defendants were or are or ever have been partners under the name and style alleged, or in any name or style, or that they were a partnership in any business, or name or style whatever.

Wherefore, defendant prays judgment that he be hence dismissed.

McBRIDE & ALLEN,
Defendant's Attorneys.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

John R. McBride being first duly sworn deposes as follows:

I am one of the attorneys for the defendant in this action and have read the foregoing complaint, and know the contents thereof, and the same is true as I verily believe. I further state that the said John H. Stone, defendant, is not within this county, and I make this affidavit on account of his absence therefrom.

18

JNO. R. McBRIDE.

Subscribed and sworn to before me this 8th day of August, 1892.

A. REEVES AYRES,
Clerk U. S. Circuit Court, Dist. of Wash.,
By A. H. KENYON, *Deputy.*

EXHIBIT "A."

THE UNITED STATES OF AMERICA, }
District of Idaho, }

In the District Court of the United States in and for the District of Idaho, April Term, A. D. 1891.

THE UNITED STATES }
vs. }
JOHN H. STONE, Defendant. }

John H. Stone is accused by the grand jury of the United States within and for the district of Idaho, duly summoned, sworn and empanelled, upon their oaths by this indictment, of the crime of

unlawfully cutting timber upon the public lands of the United States, committed as follows, to wit:

The said John H. Stone, at Kootenai county, in what was formerly the Territory of Idaho, now the district of Idaho, did on the first day of December, A. D. 1888, and thereafter on divers other days continually from the said first day of December, A. D.
19 1888, and up to and including the 2d day of July, A. D. 1890, unlawfully enter upon the public lands of the United States within the said Kootenai county, to wit, the even-numbered sections in township fifty-two north, range four west, Boisé meridian, fifty-three north, range two west of the Boisé meridian, and fifty-two north, range three west of the Boisé meridian, said lands being then and there the property of the United States, and did then and there unlawfully, wilfully and feloniously, cut and remove and cause and procure to be cut and removed from said lands, fifty thousand timber trees, then and there being and growing upon said lands, said timber trees consisting of pine and fir trees, and being then and there the property of the United States, of the value of fifty thousand dollars, with the intent, then and there and thereby on the part of him the said John H. Stone, to export, dispose of, use and employ said timber trees, cut and removed, and caused and procured to be cut and removed from the aforesaid public lands of the United States, as aforesaid in a manner other than for the use of the Navy of the United States, against the peace and dignity of the United States and contrary to the form, force and effect of the United States statute in such case made and provided.

FREMONT WOOD,
U. S. District Attorney.

JAMES A. PINNEY,
Foreman U. S. Grand Jury.

Names of witnesses examined before the United States grand jury upon the finding of the foregoing indictment: M. J. Haley.

20 THE UNITED STATES OF AMERICA, } ss:
District of Idaho, }

I, A. L. Richardson, clerk of the United States circuit court for the district of Idaho, do hereby certify that the foregoing copy of indictment has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Boisé City in said district this 19th day of Oct., 1891.

[SEAL.] A. L. RICHARDSON, *Clerk.*

Due service by copy of within answer admitted this 17th day of August, 1892.

P. H. WINSTON,
Attorney for Plaintiff.

And afterwards, to wit: on the 7th day of Sept., 1892, there was duly filed in said court, in said cause, a demurrer to the separate answer of the defendant John H. Stone, in the words and figures as follows, to wit:

In the District Court of the United States, District of Washington, Eastern Division, Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as Spokane Fuel Company, Defendants.

21 And now comes The United States, the plaintiff, by P. H. Winston, its attorney, and demurs to the separate answer of defendant, John H. Stone, for insufficiency in not stating facts sufficient to constitute a defense.

P. H. WINSTON,
U. S. Attorney and Attorney for Plaintiff.

Service of within demurrer accepted this 7th day of September, 1892.

McBRIDE & ALLEN,
Attorneys for Defendant John H. Stone,
By A. H. KENYON.

And afterwards, to wit: on Wednesday the 5th day of April, 1893, the same being the second judicial day of the regular April term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company.

And now on this 5th day of April, A. D. 1893, the court having duly considered the demurrer of the plaintiff to the plea set out in the answer of the defendant John H. Stone, and being fully advised in the premises,

22 It is ordered that said demurrer be and the same is hereby sustained, to which ruling the said defendant, John H. Stone, excepts, and his exception is allowed.

And afterwards, to wit: on the 11th day of April, 1893, there was duly filed in said court, in said cause an amended answer of the defendant, John H. Stone, in the words and figures as follows, to wit:

United States District Court, District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE *et al.*, Defendants.
} Amended Answer.

Answer of Defendant Stone.

Now comes the defendant, John H. Stone, and for his separate and amended answer to this complaint, denies each and every allegation in the complaint, except that said lands described are in the county of Kootenai, State of Idaho.

Wherefore, defendant prays to be hence dismissed.

McBRIDE & ALLEN,
Attorneys for Defendants.

STATE OF WASHINGTON,
County of Spokane, } *ss:*

John H. Stone, being first duly sworn, deposes and says:

23 That he is one of the defendants in the above-entitled cause; that he has heard read the foregoing answer and knows the contents thereof, and that the same is true as he verily believes.

JOHN H. STONE.

Subscribed and sworn to before me, this 11th day of April, 1893.

S. A. WELLS,
[SEAL.] *Notary Public, Residing at the City of Spokane, Washington.*

Service of the within by copy admitted this April 11th, 1893.

P. H. WINSTON,
U. S. District Attorney.

And afterwards, to wit: on Saturday the 15th day of April, 1893, the same being the 11th judicial day of the regular April term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

THE UNITED STATES
vs.
JOHN H. STONE.
} No. 86.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company.
} No. 89.

24 And now on this 15th day of April, 1893, it is ordered that the above causes be and the same are hereby consolidated.

And afterwards, to wit, on Saturday, the 15th day of April, 1893, the same being the eleventh judicial day of the regular April term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

THE UNITED STATES
vs.
JOHN H. STONE. } No. 86.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER,
Doing Business as the Spokane Fuel Company. } No. 89.

Now on this 15th day of April, 1893, this cause coming on for trial, the plaintiff appears by Patrick Henry Winston, Esq., United States attorney, and the defendants by Messrs. McBride & Allen, and Hyde, Glass & Reagan, their attorneys, and thereupon a jury being called came and duly answered to their respective names and were sworn, to wit:

	John McKinney.	Ben. Hansen.
	J. D. Hamilton.	Chas. Falding.
	S. S. Collins.	S. A. Fulquartz.
25	J. C. De Haven.	A. J. Squires.
	John Giffin.	A. A. Sage.
	S. L. Van Marter.	J. H. Long.

And thereupon said cause duly proceeded by hearing the evidence until the hour of adjournment, when by consent of counsel the jury being admonished by the court were allowed to separate until the incoming of court on Monday morning.

And afterwards, to wit: on Monday, the 17th day of April, 1893, the same being the 12th judicial day of the regular April term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

12TH DAY, MONDAY, *April* 17, 1893.

Court met at 10 o'clock a. m.

Present, Honorable C. H. Hanford, United States district judge, of the bench. Other officers as of yesterday.

THE UNITED STATES
vs.
JOHN H. STONE. } No. 86.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company. } No. 89.

26 And now on this day, this cause again coming on for hearing the jury being called, came and duly answered to their names, and thereupon the cause duly proceeded by hearing the evidence until the hour of adjournment, when the jury being admonished by the court were allowed to separate till the incoming of court tomorrow morning.

But afterwards, to wit: on Tuesday, the 18th day of April, 1893, the same being the 13th judicial day of the regular April term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had, to wit:

THIRTEENTH DAY, TUESDAY, *April* 18, 1893.

Court met at 10 o'clock a. m.

Present, Hon. C. H. Hanford, U. S. district judge, on the bench. Other officers as of yesterday.

THE UNITED STATES
vs.
JOHN H. STONE. }

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company. }

27 And now on this day this cause again coming on for hearing, the jury being called came and duly answered to their names, and thereupon the cause duly proceeded by hearing the evidence until the hour of adjournment, when the jury being admonished by the court, were allowed to separate till the incoming of court tomorrow morning.

But afterwards, to wit: on Wednesday, the 19th day of April, 1893, the same being the 14th judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

FOURTEENTH DAY, WEDNESDAY, *April* 19, 1893.

Court met pursuant to adjournment.

Present, Hon. C. H. Hanford, U. S. district judge, on the bench. Other officers as of yesterday.

THE UNITED STATES
vs.
JOHN H. STONE.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company.

28 And now on this day, this cause again coming on for hearing, the jury being called came and duly answered to their names, and thereupon the cause duly proceeded by hearing the evidence until the hour of adjournment, when the jury being admonished by the court were allowed to separate till the incoming of court tomorrow morning.

But afterwards, to wit: on Thursday, the 20th day of April, 1893, the same being the 15th judicial day of the regular April term of said court—present the Honorable Cornelius H. Hanford, United States district judge, presiding—the following — were had in said cause, to wit:

FIFTEENTH DAY, THURSDAY, *April* 20, 1893.

Court met pursuant to adjournment.

Present, Hon. C. H. Hanford, U. S. district judge, on the bench. Other officers as of yesterday.

THE UNITED STATES
vs.
JOHN H. STONE. } No. 86.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company. } No. 89.

And now on this day this cause again coming on for hearing, the jury being called came and duly answered to their
29 names, and thereupon the cause duly proceeded by hearing the evidence until the hour of adjournment, when the jury being admonished by the court, were allowed to separate till the incoming of court tomorrow morning.

But afterwards, to wit: on Friday, the 21st day of April, 1893, the same being the 16th judicial day of the regular April term of

said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

SIXTEENTH DAY, FRIDAY, *April* 21*st*, 1893.

Court met pursuant to adjournment.

Present, Hon. C. H. Hanford, U. S. district judge, on the bench. Other officers as of yesterday.

UNITED STATES
vs.
JOHN H. STONE. } No. 86.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company. } No. 89.

And now on this day, this cause again coming on for hearing, the jury being called, came and duly answered to their names, and the cause duly proceeded by hearing the evidence and arguments of counsel till the close of the case, when, by consent of counsel, the jury were admonished by the court and allowed to separate till the incoming of the court tomorrow morning.

But afterwards, to wit: on Saturday, the 22d day of April, 1893, the same being the 17th judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

SEVENTEENTH DAY, SATURDAY, *April* 22, 1893.

Court met pursuant to adjournment.

Present, Hon. C. H. Hanford, U. S. district judge, on the bench. Other officers as of yesterday. R. M. Hopkins, clerk.

UNITED STATES
vs.
JOHN H. STONE. } No. 86.

and

THE UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company. } No. 89.

And now on this day the jury in this cause being duly called, answer to their names, and were thereupon duly charged by the court, and retire to deliberate on their verdict.

31 UNITED STATES
vs.
JOHN H. STONE. } No. 86.

and

UNITED STATES
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company. } No. 89.

SUNDAY, *April* 23*d*, 1893.

And now on this 23d day of April, A. D. 1893, the jury heretofore empanelled in this cause came into open court and being called duly answer to their names, and return the following verdict, to wit:

In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant. } Verdict.

We, the jury in the case of The United States of America, plaintiff, against John H. Stone, defendant, find for the plaintiff and assess its damages at the sum of $19,000.00 *dollars.*

JOHN GIFFIN, *Foreman.*

32 In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants. } Verdict.

We the jury in the case of The United States of America, plaintiff, against John H. Stone, Edward Noonan and W. G. Kegler, doing business as the Spokane Fuel Company, defendants, find for the plaintiff against the defendant John H. Stone only, and assess its damages at the sum of dollars $3,000.00.

JOHN GIFFEN, *Foreman.*

In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE, Defendant.

and

UNITED STATES
vs.
JOHN H. STONE *et al.*, Defendants.

33 Did the defendant Stone receive any saw-logs which had been unlawfully taken from any part of the lands specified in the complaint?

Answer. Yes.

What sum does the jury award as damages on account of saw-logs?

Answer. $15,000.00.

In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE, Defendant.

and

UNITED STATES, Plaintiff,
vs.
JOHN H. STONE *et al.*, Defendants.

Did the defendant Stone receive any railroad ties which had been unlawfully taken from any part of the lands specified in the complaint?

Answer. Yes.

What sum does the jury award as damages on account of railroad ties?

Answer. $4,000.00.

34 In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE, Defendant.

and

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE *et al.*, Defendants.

Did the defendant Stone receive any cord-wood which had been

unlawfully taken from any part of the lands specified in the complaint?

Answer. Yes.

What sum does the jury award as damages on account of cord-wood?

Answer. $3,000.00.

And afterwards, to wit: on the 24th day of April, 1893, there was duly filed in said court, in said cause, a motion in arrest of judgment, in words and figures as follows, to wit:

United States District Court, District of Washington, Eastern Division.

35 THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants.

Motion in Arrest of Judgment.

Now comes the defendant, John H. Stone, and moves the court to set aside the verdict rendered in the above cause by the jury and for arrest of judgment thereon, on the ground:

First. This action is against the defendants named as a partnership, and was for property alleged to have been converted by the defendants, and there was no proof that there was any such partnership in existence, or ever had been, or that any member of said partnership had ever had or received any part or portion of said property, or that it had been transported from Idaho.

Second. There is no evidence that the cord-wood, which — admitted he had delivered to the purchaser of it, came from the public lands of the United States.

Third. This action is — by the statute approved March 3, 1891, sec. 8, page 1099. Laws of 51st Congress, *W. S. S.* at Large.

McBRIDE & ALLEN,
Defendants' Attorneys.

And afterwards, to wit, on Friday, the 28th day of April,
36 1893, the same being the twenty-second judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Washington, Eastern Division.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant.

The jury in this action, having on a former day of this term rendered a verdict for the plaintiff, and assessed its damages at $19,000, and on motion for a new trial having been made:

It is therefore considered by the court that the said plaintiff recover from the said defendant the sum of $19,000, together with $1,320.77, its costs as taxed herein and allowed, and execution issue for the same.

April 28th, 1893.

C. H. HANFORD.

And afterwards, to wit: on Saturday the 12th day of May, 1893, the same being the 35th judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

37 In the United States District Court for the District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants. } Case No. 89.

SATURDAY, *May* 13, 1893.

And now on this day, this cause came on for hearing upon the motion of the defendant, John H. Stone, in arrest of judgment.

And thereupon the same was argued by respective counsel and submitted to the court, and was by the court taken under advisement.

And now, on due consideration of said motion, the court being fully advised in the premises,

It is ordered that said motion be, and the same is hereby, sustained.

And it is further ordered that the verdict of the jury heretofore returned and entered on the 23d day of April be, and the same is hereby, set aside.

C. H. HANFORD, *Judge.*

And afterwards, to wit: on the 1st day of May, 1893, there was duly filed in said court, in said cause, the bill of exceptions of the defendant, John H. Stone, in the words and figures as follows, to wit:

38 In the District Court of the United States, District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants.

Causes consolidated.

To Hon. P. H. Winston, U. S. dist. attorney, dist. of Washington:

Please take notice that the undersigned attorneys for John H. Stone, defendant in each of the above-entitled actions, have this day filed with the clerk of the above court a bill of exceptions in said causes, which they will present to the court to be settled and allowed as the bill of exceptions in said causes, a copy of which proposed bill of exceptions is hereto attached. Dated this 1st day of May, 1893.

Yours, etc.,

ALBERT HAGAN AND
McBRIDE & ALLEN,
Attorneys for Defendant John H. Stone.

39 The District Court of the United States, District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant.

Bill of Exceptions.

Be it remembered, that on the 14th day of April, 1893, this cause came on to be heard before the Honorable Cornelius H. Hanford, judge of said court, at its regular term holden at the city of Spokane, Washington, on the demurrer of the plaintiff to the following portion of the defendant's answer *find* in said cause, to wit:

"Further answering the complaint of plaintiff, this defendant for further defense to this action, alleges:

That in the month of April, 1891, at a term of the United States district court held at Boisé City, in the district of Idaho, whereat the Honorable James H. Beatty, United States district judge, presided, and Fremont Wood, Esq., was attorney for the United States, a grand jury was regularly empanelled and sworn; that the said trespasses and wrongs complained of herein were then and there presented by said United States attorney to said grand jury, for investigation, and such proceedings were then and there had and taken that the said grand jury found and returned into said court

true bills of indictment, in which each and all of the wrongs
40 and trespasses complained of herein were included, and this defendant was charged thereby with the commission of an offense against the penal laws of the United States, forbidding the cutting or removal of timber from the lands of the United States.

On all the charges involving the acts of this defendant as set forth in the complaint filed herein, this defendant was upon said indictments afterwards in said court tried and acquitted upon trial before said court and a jury, and the defendant was adjudged innocent and discharged therefrom by the judgment of said court, all of which this defendant will verify by the record thereof, and the judgment of said court, upon each and every other charge preferred against him as aforesaid, was duly entered against said plaintiff in said proceedings; the issues therein being the same as are now presented in this action, and were each and all determined and adjudged in this defendant's behalf, and against the plaintiff, all of which will appear by the record and proceedings of the court therein, which this defendant will procure.

Wherefore, this defendant alleges, that the issues tendered by the plaintiff herein have been heard, tried and adjudged for defendant and against the plaintiff, by a court of competent jurisdiction, and that said judgment and determination preclude the maintenance of this suit."

That the plaintiff thereupon filed by its district attorney a demurrer to all of said matter in words as follows:

"And now comes the United States of America, by its at-
41 torney, P. H. Winston, and to the matter alleged in the separate and further defense in said answer contained, plaintiff demurs to the same for the reason that the facts are not, if true, sufficient to constitute in law a defense.

P. H. WINSTON,
U. S. Attorney."

And be it remembered, that after argument thereon by the respective counsel, the court took the same under advisement, and to wit: on the 5th day of April, 1893, announced its ruling and decision thereon, and sustained the said demurrer, to which ruling and decision the said defendant by his counsel then and there excepted as error, which exception was allowed.

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants.

Bill of Exceptions.

Be it remembered, that at a term of the district court of the United States for the district of Washington, eastern division, begun and held at Spokane, beginning on the 4th of April, 1893, the Honorable Cornelius H. Hanford, judge, presiding, this cause came on

regularly for hearing, the said plaintiff appearing by Patrick H. Winston, Esq., United States district attorney, and the de-
42 fendant John H. Stone appearing by his attorneys, John R. McBride and Albert Hagan, and the defendant Noonan, by his attorney W. C. Jones, and the cause was heard on the demurrer of plaintiff, filed to the separate answer of the defendant, John H. Stone, which answer was as follows:

"In the District Court of the United States, District of Washington, Eastern Division.

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE *et al.*, Defendants. } Answer.

Now comes the said defendant, John H. Stone, and filing his separate answer and defense to this action alleges for his first defense—

That he was indicted upon a charge of cutting timber unlawfully from the same lands and premises, upon which the alleged trespasses complained of in this action are founded, at the April term of the United States district court, for the district of Idaho. That he was thereafter arrested thereon and appeared in said court. A copy of the indictment is hereto annexed and made part hereof, marked Exhibit "A;" that such proceedings were afterwards had, a judgment was duly given and rendered in favor of the said defendant, and he has been fully acquitted and discharged of said offense, and of said trespass thereby.

Wherefore, defendant pleads the judgment of said court in full discharge of said cause of action and in bar of all right of action on account thereof.

43 For a further special defense this defendant denies that the persons named as defendants were or are or ever have been partners under the name and style alleged, or in any name or style, or that they were a partnership in any business, or name or style whatever.

Wherefore, defendant prays judgment that he be hence dismissed.

McBRIDE & ALLEN."

STATE OF WASHINGTON, } *ss:*
County of Spokane, }

John R. McBride, being first duly sworn, deposes as follows:

I am one of the attorneys for the defendant in this action and have read the foregoing complaint, and know the contents thereof, and the same is true as I verily believe. I further state that the said John H. Stone, defendant, is not now within this county, and I make this affidavit on account of his absence therefrom.

JNO. R. McBRIDE.

Subscribed and sworn to before me this 8th day of August, 1892.

A. REEVES AYRES,
Clerk U. S. Circuit Court, Dist. of Wash.,
By A. H. KENYON, *Deputy.*

Endorsement: Dist. court of the U. S. dist. of Washington, E. division. United States of America, plaintiff, *vs.* John H. Stone *et al.*, defendants. Separate answer of John H. Stone. Filed Aug. 9th, 1892, in the U. S. district court. R. M. Hopkins, clerk, by A. H. Kenyon. McBride & Allen, att'ys for def't Stone.

Due service, by copy, of within answer admitted this 17th day of August, 1892.

P. H. WINSTON,
Att'y for Plaintiff.

THE UNITED STATES OF AMERICA, }
District of Idaho. }

In the District Court of the United States in and for the District of Idaho, April Term, A. D. 1891.

THE UNITED STATES }
vs. }
JOHN H. STONE, Defendant. }

John H. Stone is accused by the grand jury of the United States within and for the district of Idaho, duly summoned, sworn and empanelled, upon their oaths by this indictment, of the crime of unlawfully cutting timber upon the public lands of the United States, committed as follows, to wit:

The said John H. Stone, at Kootenai county, in what was formerly the Territory of Idaho, now the district of Idaho, did on the first day of December, A. D. 1888, and thereafter on divers other days continually from the said first day of December, A. D. 1888,
45 and up to and including the 2d day of July, A. D. 1890, unlawfully enter upon the public lands of the United States within the said Kootenai county, to wit: the even-numbered sections in townships fifty-two north, range four, west Boisé meridian, fifty-three north, range two, west of the Boisé meridian, and fifty-two north, range three, west of the Boisé meridian; said lands being then and there the property of the United States, and did then and there unlawfully, wilfully and feloniously, cut and remove and cause and procure to be cut and removed from said lands fifty thousand timber trees then and there being and growing upon said lands, said timber trees consisting of pine and fir trees, and being then and there the property of the United States, of the value of fifty thousand dollars, with the intent then and there, and thereby on the part of him, the said John H. Stone, to export, dispose of, use and employ said timber trees, cut and removed and caused and procured to be cut and removed from the aforesaid public lands of

the United States, as aforesaid, in a manner other than for the use of the Navy of the United States, against the peace and dignity of the United States, and contrary to the form, force and effect of the United States statute in such case made and provided.

FREMONT WOOD,
U. S. Dist. Attorney.

JAMES A. PINNEY,
Foreman U. S. Grand Jury.

Names of witnesses examined before the United States grand jury upon the finding of the foregoing indictment: M. J. Haley.

46 UNITED STATES OF AMERICA, } ss:
District of Idaho, }

I, A. L. Richardson, clerk of the United States circuit court for the district of Idaho, do hereby certify that the foregoing copy of indictment has been by me compared with the original, and it is a correct transcript therefrom, and of the whole of such original as the same appears on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Boisé City, in said district, this 19th day of Oct., 1891.

[SEAL.] A. L. RICHARDSON, *Clerk.*

Endorsement: No. 210. In the United States district court in and for the district of Idaho. The United States *vs.* John H. Stone, defendant. Indictment. A true bill. James A. Pinney, foreman U. S. grand jury. Fremont Wood, U. S. dist. attorney. Presented by the foreman in open court and filed in the presence of the grand jury, this 30th day of April, A. D. 1891. A. L. Richardson, clerk.

To which answer the plaintiff filed its demurrer as follows:

"In the District Court of the United States, District of Washington, Eastern Division, Ninth Circuit.

47 UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as Spokane Fuel Company, Defendants.

And now comes The United States, the plaintiff, by P. H. Winston, its attorney, and demurs to the separate answer of defendant John H. Stone, for insufficiency, in not stating facts sufficient to constitute a defense.

P. H. WINSTON,
U. S. Att'y and Att'y for Plaintiff.

Endorsement: In the district court of the United States, district of Washington, eastern division. No. 89. United States of America *vs.* Spokane Fuel Co., defendants. Demurrer to answer of John H. Stone."

After argument, the court took the matter under advisement and on the fifth day of April, 1893, delivered its decision thereon, and sustained said demurrer; to which ruling and decision the defendant Stone then and there excepted.

And be it remembered: that afterwards, to wit, on the 15th day of April, 1893, this action, the case of The United States of America *vs.* John H. Stone, came on regularly for trial, before the
48 court, and on motion of the plaintiff, and on motion of the United States district attorney, on behalf of plaintiff, the court made an order consolidating this action with the action of the plaintiff in this court, entitled "The United States of America, plaintiff, *vs.* John H. Stone, Edward Noonan and W. G. Kegler, doing business as the Spokane Fuel Company, defendants," the said action being No. 89, on the register of actions in this court, and ordered that the said actions be tried together. And thereafter a jury was called and examined, and all challenges for cause to the same having been determined the court directed the respective parties, plaintiff and defendants, to proceed with their peremptory challenges, if any they had, to said jurors. Whereupon the defendant Stone exercised his challenges upon said panel to the number of three. That afterwards the jury empanelled, having been passed for cause, consisted of 12 persons, to wit:

1. John McKenney.	2. J. D. Hamilton.
3. S. C. Collins.	4. J. C. De Haven.
5. John Giffin.	6. S. L. Van Master.
7. Ben. Hansen.	8. Charles Falding.
9. L. A. Fulquartz.	10. A. J. Squires.
11. A. A. Sage.	12. J. H. Long.

That thereupon the defendants Stone and Noonan peremptorily challenged John Giffin, one of the jurors, upon the ground that the defendants were entitled to challenge peremptorily in each of the cases on trial, three jurors, and that they desired to exercise said challenge upon said juror in the said cause, No. 89, on behalf of said defendants. The plaintiff objected to the challenge to
49 said juror, and to any further peremptory challenges to the jury, by the defendants, or either of them, on the ground: that having already challenged three jurors, in the trial of these consolidated cases, their challenges were exhausted; and the court sustained the objection, and denied the challenge, and permitted the said juror to remain upon the panel. To which ruling and decision, the defendants then and there excepted.

The jury being sworn to try the said cause together, the trial herein proceeded, and the causes were heard upon the complaint and amended answer of the case of "The United States *vs.* Stone," and upon the complaint and answer in the consolidated case of "The United States *vs.* The Spokane Fuel Company." Whereupon to sustain the issues upon the part of the plaintiff a large number of witnesses were sworn on its behalf and testified; said trial proceeding from day to day until the close of the sitting on the 19th

day of April, 1893, and the plaintiff rested its testimony in behalf of said actions. And thereafter on the 20th of April, 1893, the said trial was proceeded with, and the said defendant Stone, to sustain the defense on his part, offered in evidence the following documents, to wit:

"THE UNITED STATES OF AMERICA, }
District of Idaho. }

In the District Court of the United States in and for the
50 District of Idaho, April Term, A. D. 1891.

THE UNITED STATES }
vs. }
JOHN H. STONE, Defendant. }

John H. Stone is accused by the grand jury of the United States within and for the district of Idaho, duly summoned, sworn and empanelled, upon their oaths by this indictment, of the crime of unlawfully cutting timber upon the public lands of the United States, committed as follows, to wit:

The said John H. Stone, at Kootenai county, in what was formerly the Territory of Idaho, now the district of Idaho, did on the first day of December, A. D. 1888, and thereafter on divers other days and continuously from the said first day of December, A. D. 1888, up to and including the 2d day of July, A. D. 1890, unlawfully enter upon the public lands of the United States within the said Kootenai county, to wit: the even-numbered sections in townships fifty-two north, range four, west Boisé meridian, fifty-three and fifty-two north, range three, west of the Boisé meridian; said lands being then and there the property of the United States, and did then and there unlawfully, wilfully and feloniously, cut and remove and cause and procure to be cut and removed from said lands, fifty thousand timber trees then and there being and growing upon said lands, said timber trees consisting of pine and fir trees, and being then and there the property of the United
51 States, of the value of fifty thousand dollars, with the intent then and there, and thereby on the part of him, the said John H. Stone, to export dispose of, use and employ said timber trees, cut and removed and caused and procured to be cut and removed from the aforesaid public lands of the United States, as aforesaid, in a manner other than for the use of the Navy of the United States, against the peace and dignity of the United States, and contrary to the form, force and effect of the United States statutes in such case made and provided.

FREMONT WOOD,
U. S. Dist. Attorney.

JAMES A. PINNEY,
Foreman U. S. Grand Jury."

Names of witnesses examined before the United States grand jury upon the finding of the foregoing indictment: M. J. Haley.

Endorsement.

No. 210. In the United States district court in and for the district of Idaho. The United States *vs.* John H. Stone, defendant.

Indictment. A true bill. James A. Pinney, foreman U. S. grand jury. Fremont Wood, U. S. dist. attorney.

Presented by the foreman in open court and filed in the presence of the grand jury, this 30th day of April, A. D. 1891.

A. L. RICHARDSON, *Clerk.*

52 In the District Court of the United States for the District of Idaho, September Term, 1891.

Present, Hon. Jas. H. Beatty, judge.

MONDAY, *November 2d*, 1891.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

On this day the defendant herein came into court in person and by his attorneys, John R. McBride and L. Vineyard, Esqs., to be arraigned upon the true bill of indictment heretofore presented against him by the grand jury. Being asked if John H. Stone was his true name, the defendant answered that it was; thereupon the formal reading of the indictment was waived and defendant furnished a copy thereof. Ordered, that def't plead to said indictment at 2 o'clock p. m. on tomorrow, the 3d inst.

TUESDAY, *November 3rd*, 1891.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

On this day the def't herein, by his attorney, filed a demurrer to the indictment in this cause.

53 THURSDAY, *November 12th*, 1891.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

On this day the defendant's demurrer to the indictment in this cause and in seven similar causes, to wit: No. 225, The United States *v.* John Hall and John H. Stone. No. 232, The United States *v.* Charles A. Galloway and John H. Stone. No. 230, The United States *v.* Wm. G. Powers *et al.* No. 215, The United States *vs.* John Shafer *et al.* No. 214, The United States *vs.* Angus Monroe *et al.* No. 211, The United States *vs.* Sven Jensen *et al.* No. 228, The United States *vs.* Thos. J. Imbody *et al.*, came regularly on to be heard, Jno. R. McBride, L. Vineyard and Albert Hagan, Esqs., appearing as counsel for the defendants, and the demurrers; and Fre-

mont Wood, U. S. attorney, and Edgar Wilson, special U. S. attorney, for the United States and against said demurrers, the farther hearing of the same was adjourned until tomorrow the 13th inst.

FRIDAY, *November 13th*, 1891.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Unlawfully Cutting Timber.

The argument on the demurrer to the indictment herein and in seven similar causes, adjourned on yesterday for further hearing was this day continued by Fremont Wood, Esq., U. S. attor-
54 ney, on behalf of the plaintiff, and concluded by Albert Hagan, Esq., on behalf of the defendants, after which said demurrers were submitted and taken under advisement by the court.

MONDAY, *November 16th*, 1891.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

On this day was announced the decision of the court on the demurrer in the indictment herein heretofore argued and submitted. Ordered that said demurrer be and the same is hereby overruled. To which ruling the defendant by his counsel then and there excepted, and the said defendant being present and being asked for his plea pleaded that he is not guilty of the offense charged in the indictment. Ordered that said cause be set for trial on the first Monday in February next.

MONDAY, *February 1st*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

It appearing satisfactorily to the court, that Geo. Hungerford, has been subpœnaed as a witness on behalf of the United States in the above-entitled cause, and that he has failed to appear, on motion of the U. S. attorney, ordered that an attachment issued for said wit-
ness, returnable forthwith, to show cause why he should not
55 be punished for contempt, for his failure to obey said subpœna, and the writ was issued accordingly.

TUESDAY, *February 2d*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

Now came the U. S. attorney and moved the court to consolidate the following-entitled causes with this cause for trial, to wit: No. 230, The United States *vs.* Wm. G. Powers and John H. Stone; No. 211, The United States *vs.* Sven Jansen and John H. Stone;

No. 213, The United States *vs.* Alexander A. McDonald and John H. Stone; No. 226, The United States *vs.* Charles Shaw and John H. Stone; No. 227, The United States *vs.* Hiram Price and John H. Stone; No. 231, The United States *vs.* Geo. Stonebraker and John H. Stone; No. 214, The United States *vs.* Angus Monroe and John H. Stone; and No. 286½, The United States *vs.* John H. Stone; which motion was opposed by defendant's counsel, and after argument by the respective counsel, said motion was submitted, and taken under advisement by the court.

WEDNESDAY, *February 3d*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

On this day was announced the decision of the court on
56 the motion to consolidate crime Nos. 230, 211, 213, 226, 227, 231, 214, and 286½, with this cause for trial, to the effect, that said motion be sustained and ordered that said causes be consolidated with this cause for trial.

THURSDAY, *February 4th*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } No. 210. Crime: Cutting Timber Unlawfully.

By direction of the Attorney General of the United States, and on motion of the U. S. attorney, ordered that H. E. McElroy, be and is hereby appointed reporter to take the testimony in this cause, and the causes consolidated herewith for trial. Thereupon said cause together with the causes heretofore consolidated with this cause for trial came regularly on to be heard and tried before the court and jury. Fremont Wood, U. S. attorney, and Edgar Wilson, assistant to the U. S. attorney, appearing as counsel for the United States, and Messrs. Allen and Jno. R. McBride, Albert Hagan, and L. Vineyard, Esqs., for the defendant, John H. Stone; the said defendant Stone being in court in person. The defendant by his counsel here moved the court, that plaintiff be required to elect upon which case plaintiff will proceed to trial, which motion was by the court overruled. To which ruling the said defendant, by his counsel, then and there excepted in due form of law. The clerk under direction of the court, proceeded to draw from the jury-box the names of twelve persons, one at a time, to serve as a jury in said cause. Geo. Pettingill, a person drawn from the box and sworn, was excused for cause. Geo. M. Winkler,
57 R. P. Chattin and Samuel Jackson, persons drawn from the box and sworn were excused on peremptory challenge by plaintiff's counsel. Jos. C. Straughn, a person drawn from the box, was excused on peremptory challenge by counsel for defendant, and the following are the names of the persons drawn from the box, sworn on *voir dire*, passed upon, accepted by counsel for respective parties, and sworn by the clerk to well and truly try said

cause and a true verdict render therein, according to the law and evidence, to wit: Hugo Bayhouse, C. P. Oliver, Henry Clifton, Edward Strauss, Wm. Gardner, B. F. Swalley, H. P. Linder, I. N. Costin, Tim Regan, J. P. Utley, P. Gallagher, and J. P. Chinn.

The clerk under direction of the court read the indictments to the jury, and stated the plea of the defendant, Stone. On motion of the U. S. attorney, ordered that during the trial of these causes the jury be kept together, and in charge of bailiffs of the court, and their meals and lodging be furnished by the marshal at the expense of the United States. The following-named persons were sworn, examined and cross-examined as witnesses on behalf of plaintiff, to wit: Simon Openheimer and W. P. Shafer, after which the court admonished the jury, placed the same in charge of sworn officers of the court, and adjourned the further hearing of said causes until tomorrow the 5th inst.

58 FRIDAY, *February 5th*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } Crime. No. 210. Consolidated for Trial with Nos. 230, 211, 213, 226, 227, 231, 214, and 286½.

The trial of these causes consolidated for trial, adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, and the respective attorneys of record, and the defendant in person being in court. The following-named persons were sworn, examined and cross-examined, as witnesses on behalf of plaintiff, to wit: M. J. Haley, James F. Russell and Martin J. Gillis, and during the cross-examination of the latter-named witness the court admonished the jury, and placed the same in charge of sworn officers of the court and adjourned the further hearing of said cause until tomorrow, the 6th inst.

SATURDAY, *February 6th*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } Crime. No. 210. Consolidated for Trial with Nos. 230, 213, 226, 227, 231, 211, 214, and 286½.

The trial of these causes adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present; the respective attorneys of record, and the defendant in person being in court. The following-named persons were sworn, examined and cross-examined, as witnesses on behalf of plaintiff, to wit: Martin J. Gillis, concluded; A. A. McDonald, M. W. Kelley and John Shafer, after which the court admonished the
59 jury, placed the same in charge of sworn officers of the court, and adjourned the further hearing of said cause until Monday, the 8th inst., at 10 o'clock a. m.

MONDAY, *February 8th*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } Crime. No. 210. Consolidated with Nos. 230, 213, 226, 227, 231, 211, 214, and 286½.

The trial of these causes adjourned on Saturday, the 6th inst. for further hearing, was this day resumed. Jury called and found to be present, and the respective attorneys of record, and the defendant in person being in court. The following-named persons were sworn, examined, and cross-examined as witnesses on behalf of plaintiff, to wit: Wm. G. Powers, Chas. Shaw, Sven Jansen, Angus Monroe, Geo. Hungerford, Marshall Jones, and Thomas Harland, after which the court admonished the jury, placed the same in charge of sworn officers of the court and adjourned for further hearing of said cause until tomorrow the 9th inst.

TUESDAY, *February 9th*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } Crime. No. 210. Consolidated with Nos. 230, 213, 226, 227, 231, 211, 214, and 286½.

The trial of these causes adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, and the respective attorneys of record and the defendant in
60 person being in court. The following-named persons were sworn, examined and cross-examined, as witnesses on behalf of plaintiff, to wit: J. B. Casner, S. B. Smith, A. D. Robertson, Aan't McNaughton, R. L. Ferbreche and Chas. Frederick, and the plaintiff rests. Here the court admonished the jury, placed the same in charge of sworn officers of the court and adjourned the further hearing of said cause until tomorrow the 10th inst.

WEDNESDAY, *February 10th*, 1892.

THE UNITED STATES *vs.* JOHN H. STONE. } Crime. No. 210. Consolidated with Nos. 230, 213, 226, 227, 231, 211, 214, and 286½.

The trial of these causes adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, the respective attorneys of record and the defendant in person being in court. The following-named persons were sworn, examined and cross-examined as witnesses on behalf of defendant to wit: John H. Stone, and Henry Malder, after which, the court admonished the jury, placed the same in charge of sworn officers of the court and adjourned the further hearing of said cause until tomorrow, the 11th inst.

THURSDAY, *February* 11*th*, 1892.

THE UNITED STATES } Crime. No. 210. Consolidated with
vs. } Nos. 230, 213, 226, 227, 231, 211, 214,
JOHN H. STONE. } and 286½.

61 The trial of these causes adjourned on yesterday for further hearing was this day resumed, jury called and found to be present; the respective attorneys of record and the defendant in person being in court. The following-named persons were sworn, examined and cross-examined as witnesses on behalf of defendant, to wit: T. J. Imbody, Charles Galloway, John Lyons, Rob't McClellan, H. D. Linton, Edward Know, N. S. Harlan, S. L. Smith, C. M. Benson and John H. Stone, and the defense rest here. M. J. Haley was recalled and examined in rebuttal and the evidence and testimony closed. Here the court admonished the jury, and adjourned the further hearing of said cause until tomorrow the 12th inst.

FRIDAY, *February* 12*th*, 1892.

THE UNITED STATES } Crime. No. 210. Consolidated with
vs. } Nos. 230, 213, 226, 227, 231, 214,
JOHN H. STONE. } and 286½.

The trial of these causes adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present; the respective attorneys of record, and the defendant in person being in court. The court and jury were addressed by Fremont Wood, U. S. attorney, on behalf of the plaintiff, followed by Albert Hagan and Jno. R. McBride, Esqs., on behalf of defendant. After which the court admonished the jury, placed the same in charge of sworn officers of the court and adjourned the further hearing of said cause until tomorrow the 13th inst., at 10 o'clock a. m.

62 SATURDAY, *February* 13*th*, 1892.

THE UNITED STATES } Crime. No. 210. Consolidated with
vs. } Nos. 230, 213, 226, 227, 231, 214,
JOHN H. STONE. } and 286½.

The trial of these causes adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present, the respective attorneys of record, and the defendant in person being in court. Edgar Wilson, ass't U. S. attorney, concluded the argument on behalf of plaintiff, and said jury after being instructed by the court, retired to their room to consider of their verdict, in charge of an officer of the court, who was first duly sworn.

Now came the jury, and called and found to be present the respective attorneys of record and the defendant in person being in court. Being asked if they had agreed upon a verdict they, through their foreman, stated that they had, and presented their written verdict in the words following, to wit:

In the District Court of the United States in and for the District of Idaho.

No. 210, The United States *vs.* John H. Stone.
No. 230, The United States *vs.* Wm. G. Powers and John Stone.
No. 211, The United States *vs.* Sven Jansen and John H. Stone.
No. 213, The United States *vs.* Alexander McDonald and John H. Stone.
No. 226, The United States *vs.* Chas. Shaw and John H. Stone.
No. 227, The United States *vs.* Hiram Price and John H.
63 Stone.
No. 231, The United States *vs.* Geo. Stonebreaker and John H. Stone.
No. 214, The United States *vs.* Angus Monroe and John H. Stone.
No. 286½, The United States *vs.* John H. Stone.

We, the jury in the nine above-entitled cases, consolidated for the purpose of trial, find the defendant, John H. Stone, not guilty.

P. GALLAGHER, *Foreman.*

Which verdict was recorded by the clerk and read to the jury, who confirmed the same. Thereupon the court discharged said jury from the further consideration of said causes, and ordered that the defendant, John H. Stone, be discharged and his bail exonerated in each of said causes.

THE UNITED STATES OF AMERICA, }
District of Idaho, } *ss:*

I, A. L. Richardson, clerk of the United States district court for the district of Idaho, do hereby certify that the foregoing copy of journal entries in cause No. 210, The United States *vs.* John H. Stone, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original as the same appears of record at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Boisé City, in said district, this first day of April, 1893.

[SEAL.] A. L. RICHARDSON, *Clerk.*

64 UNITED STATES OF AMERICA, }
District of Idaho, } *ss:*

I, James H. Beatty, judge of the district court of the United States in and for the district of Idaho, do hereby certify that A. L. Richardson, whose genuine signature is affixed to the foregoing certificate, is and was at the time of signing the same the clerk of said court, duly authorized by law to make such certificate; that he is the legal keeper of said record, and that the foregoing attestation is in due form.

Witness my hand this 11th day of April, 1893.

JAS. H. BEATTY, *Judge.*

UNITED STATES OF AMERICA, }
District of Idaho, } ss:

I, A. L. Richardson, clerk of the district court of the United States in and for the district of Idaho, do hereby certify that the Hon. James H. Beatty, by whom the foregoing attestation was made, and whose genuine signature is subscribed thereto, was at the time of signing the same and still is judge of the district court of the United States in and for the district of Idaho, duly commissioned and sworn, to whose acts as such full faith and credit are due.

Witness my hand and the seal of said court this 11th day of April, 1893.

[SEAL.] A. L. RICHARDSON, *Clerk.*

To the introduction of which the plaintiff, by its counsel, objected on the ground that the same was irrelevant and immaterial,
65 and neither admissible in bar of this action or as evidence; which objection was sustained, and to which ruling and decision the said defendants then and there excepted, and the same were excluded from the jury.

The defendants then gave in evidence copies of the articles of incorporation and proofs of organization of the Spokane & Palouse Railway Company, duly certified by the Department of the Interior, from which it appeared that the said corporation was duly organized for the purpose of constructing and operating a line of railway, for the carriage of freight and passengers, from Marshall, in the county of Spokane, in the Territory, now State, of Washington, to Lewiston, in the Territory, now State, of Idaho; from which there was read to the jury the following:

The Spokane & Palouse Railway Company, construction department.

SPOKANE FALLS, W. T., *April* 6, 1886.

The Honorable L. Q. C. Lamar, Secretary of the Interior, Washington, D. C.

DEAR SIR: Please find enclosed:

1. A copy of the articles of incorporation of the Eastern Washington Railway Company.

2. A copy of the supplemental articles of incorporation, changing the name to that of the Spokane & Palouse Railway Company.

3. A copy of the territorial law under which this company was organized, with the certificate of the secretary of Washington Territory, that the same was correct.

66 4. A certificate of the secretary of the Territory relating to the filing of both the original "articles of incorporation" and the "supplemental articles of incorporation."

5. The official statement of the secretary of this company that the organization has been completed, and that the company is fully authorized to proceed with the construction of the road, etc.

6. A true list showing the names and designations of the respect-

ive officers of the company at the date of the proof at the Department.

7. Map of the location of the line of the Spokane & Palouse Railway Company, with the requisite certificates "or due proofs" and verification of the aforesaid map.

Very respectfully, A. M. CANNON,
President Spokane & Palouse Railway Company.

Endorsement.

Cannon, A. M., Spokane Falls, Wash. T'y, Ap'l 6th, 1886. Enclosed copy of articles of incorporation, and due proofs. Also map of Eastern Wash. R'y Co., now Spokane & Palouse R'y Co., as per amended articles enclosed. Papers ret'd for completion April 14, 1886.

A. M. DEPARTMENT OF THE INTERIOR, *May* 3, 1886.

Respectfully referred to Com'r Land Office, who will inform the company that the papers are in proper form, and are satisfactory to the department. May referred for report.

G. A. JENKS,
Assistant Secretary.

67 MAY 11TH, 1886.

Cannon advised that due proofs are satisfactory. File with right of way papers.

REED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 12, 1893.

I, S. W. Lamereoux, Commissioner of the General Land Office, do hereby certify that the annexed copy of articles of incorporation, and due proofs of organization of the Spokane & Palouse Railway Company, under act of March 3d, 1875, filed in the General Land Office April 26th, 1886, and approved by the honorable Secretary of the Interior, May 3d, 1886, is a true and literal exemplification from the original of said papers now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMEROEUX,
Commissioner of the General Land Office.

The defendants then offered, and there was then received in evidence a certified copy of the articles of incorporation and proofs of organization for the Central Washington Railroad Company, a corporation duly organized under and by virtue of the laws of the Territory, now State, of Washington, which said company was
68 for the purpose of constructing a railroad from Cheney on the Northern Pacific railroad, county of Spokane, Territory

now State, of Washington, to a point in section thirty-four (34), township twenty-five (25) north, range twenty-seven (27) east, in Douglas county, Territory of Washington, a distance of 117 miles; which said articles of incorporation were duly certified by the officers of the United States Land Office, at Washington, by the following endorsements, and documents attached thereto, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov.* 19, 1888.

Hon. W. F. Vilas, Secretary of the Interior.

SIR: I have the honor to submit herewith articles of incorporation, and due proofs of organization, filed by the Central Washington Railroad Company, under act Mar. 3, 1875, and would recommend that said papers be received and placed on file.

Also one map in three sections, showing the definite location of said company's road, from a point at Cheney in section 18, town. 23 N., range 42 E., to a point in section 34, town. 25 N., range 27 E., Douglas county, Washington Territory, a distance of 117.37 miles.

Said map has been examined in connection with the lines of the public surveys and found to agree therewith in all essential particulars. It is properly executed and authenticated, as required by the rules and regulations, and the line of route indicated thereon does not fall within the limits of any Indian, military, or other
69 Government reservation. The approval of said map is accordingly recommended, subject to all existing possessory rights, etc.

Very respectfully, S. M. STOCKSLAGER,
Commissioner.

Endorsements.

Received 128,488. General Land Office. Nov. 21, 1888.

92177. Department of Interior, L. & R. R. Div. Received Nov. 20, 1888.

Nov. 19, 1888.

Commissioner of the General Land Office.

Submits articles of incorporation and due proofs of organization of the Central Washington R. R. Co. and recommends the placing of same on file.

Also 1 map in three sections and recommends the approval of the same under act Mar. 3, 1875, subject to certain existing rights, etc.

No present answer. File with right of way papers.

REED.

F. McM. A. M.

DEPARTMENT OF THE INTERIOR, *Nov.* 20, 1888.

Respectfully returned to the Comm'r of the Gen'l Land Office for filing. The papers are in proper form and in substantial compli-

ance with the regulations, and are acceptable to the Department. The Comm'r will so inform the company.

The maps are approved and returned.

D. L. HAWKINS,
Ass't Secretary.

70 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April 12th*, 1893.

I, S. W. Lamerouex, Commissioner of the General Land Office, do hereby certify that the annexed copy of articles of incorporation, and due proofs of organization of the Central Washington Railroad Co. under act of Mar. 3, 1875, filed in the General Land Office by letter from the R. & R., Spokane Falls, Washington, dated Nov. 3, 1888, and approved by the Hon. Secretary of the Interior, Nov. 20th, 1888, is a true and literal exemplification from the original of said papers now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMEROUEX,
Commissioner of the General Land Office.

Mr. JOHN H. STONE, defendant, called as a witness in his own behalf, and having been duly sworn, testified as follows:

Examined in chief by Mr. MCBRIDE:

Q. Are you the defendant in this case?
A. I am.
Q. Where do you reside?
A. In Spokane, Washington.
Q. How long have you resided here?
A. Since about the year 1886.
71 Q. During that time what has been your business?
A. Lumbering and contracting in general.
Q. In what section of the country?
A. In northern Idaho and eastern Washington, principally.
Q. Were you employed in the years 1888, '89, and '90 on the Northern Pacific railroad line in the business of logging?
A. Yes, sir.
Q. Were you engaged in any other business in connection with that of logging?
A. Yes, sir; tie contracting.
Q. At what point was your business during those years?
A. The ties were cut all the way from Spokane Falls through Kootenai county, Idaho; the logging was done from the Idaho line as far as Granite station, Idaho; and not but a very little in Washington.
Q. What authority had you from the Northern Pacific Railroad Company for the use of timber upon its lands along the line of its road?

A. I had authority to take timber from the railroad sections, all saw-timber and timber used for ties, between Spokane Falls and Granite, Idaho.

Q. Where is Granite, Idaho?

A. Granite, Idaho, is about fifty miles east of Spokane Falls, in Kootenai county.

Q. Is it a station along the line of the Northern Pacific railroad?

A. A station on the Northern Pacific railroad; yes, sir.

72 Q. Where is it with reference to the points indicated on this diagram here (referring to diagram heretofore used on trial)?

Mr. WINSTON: Was the authority you speak of from the Northern Pacific railroad in writing, sir?

A. I do not know whether it was a written or a verbal contract in regard to some of it.

Mr. WINSTON: I understand you to say that you cannot tell us now whether or not it was in writing?

A. I am speaking, Colonel, now with reference to the same logs.

Mr. WINSTON: I understand you to say that you cannot tell whether the authority from the Northern Pacific Railroad Company to cut timber from its lands was or was not in writing?

A. I think for the saw-logs it was a verbal contract.

(Mr. MCBRIDE:)

Q. You are not speaking now of anything but the saw-logs.

A. I am speaking now of nothing but the saw-logs—not the ties. (Indicating on map:) Well, along that road there, Judge, I have a map here of my own which will perhaps assist me in finding it on this one here. This is a very poorly gotten up map that you have here.

Q. This is merely for the purpose of identifying the location of the station, Granite.

A. Granite station, I think, comes in township 53, range 3 west, of the Boisé meridian, and is in section 3.

Q. Can you find it on this map or diagram here—this one has been used throughout the trial?

73 A. It don't seem to be marked on here—the township don't seem to be marked on this map. Anyway, it is township 53, range 3 west, and it comes in section 3 (indicates on map).

Q. Now, point to the jury on this diagram where Granite station is, as near as you can point it out?

A. (Indicates point on map.) Here is Granite station, in 53, 3, and is in section 3.

Q. How far is Granite station from the place known as Stone's switch?

A. Stone's switch comes in section 15—three miles about—about three or four miles.

Q. Where did you do your work?

A. My headquarters and office were in section, 15 at Stone's switch.

Q. The description in township 53, range 3 west, section 15?

A. Yes, township 53, range 3, section 15.

Q. Now, Mr. Stone, what was your business at that point—state what it was in a general way?

A. Logging, principally.

Q. Logging, principally?

A. Principally, yes, sir.

Q. Did you cut any ties?

A. I did cut ties; the ties were cut there on railroad sections and on some others. The ties were cut on the railroad sections in township 53.

Q. You said there was some cut on other lands?

A. We were speaking of the logs, not of the ties.

Q. You say that some of the ties that were cut were not cut on railroad lands?

74 A. Yes, sir, some ties were cut on other lands.

Q. When did you commence getting out ties, in 1889?

A. I think my contract with the Central Washington was in 1888.

Q. I did not ask you when the contract was; I asked you when you commenced getting out ties.

A. In 1888.

Q. What time in 1888?

A. I would not state the time of the year, but right through the year.

Q. Did you commence in the winter, in January, 1888, to get out railroad ties, or did you begin along in the summer to get out ties?

A. During the summer is my best recollection.

Q. Did you get out ties during the years 1888 and 1889, or either of those years for the Central Washington or the Spokane & Palouse Railroad Companies?

A. I got out ties in both of those years for both of those roads.

Mr. WINSTON: I object to this testimony, and for the reason: I would like to enquire of counsel if they claim under the law that this defendant had the right to go upon the public lands of the United States to cut railroad ties for both of those companies, lands that were not the railroad lands of these two companies?

Mr. MCBRIDE: No, sir, but we claim the rignt to cut the railroad ties in this location for these companies—the lands described in the complaint where it is alleged we cut ties for these two railroads.

(Argument by counsel.)

75 The COURT: You may proceed with this defense and at the close of the testimony the court will announce its ruling. For the present I withhold ruling.

Q. Mr. Stone, had you authority from the Central Washington and the Spokane & Palouse railroads or both of these roads as its agent to take timber off the public lands for its road for construction purposes?

A. Yes, sir.

Q. How was that authority given?

A. By an appointment.

Q. Have you it with you?

A. Yes, sir; if you will excuse me I will get it. (Witness produces paper.)

Mr. McBRIDE: If the court please, we offer in evidence the appointment of Mr. Stone as agent of the Spokane and Palouse and of the Central Washington Railroad Companies, signed by its chief engineer.

(Paper marked for identification, "Def'ts' Ident. No. 2.")

Mr. WINSTON: I object to the introduction of this paper.

First, under the answer in this case it is not admissible.

Second, because the paper appears to be and purports upon its face to be a power of attorney from one H. S. Huson, chief engineer of said railroad, to John H. Stone to go anywhere upon the public lands of the United States on the line of the Northern Pacific railroad from Cheney, Washington, to Kootenai county, Idaho, upon the lands of the said road in Spokane county, Washington,
76 and Kootenai county, Idaho Territory, and cut timber to be used in the construction of said company's line of railroad—that is, the Central Washington railroad.

(Argument by counsel.)

The COURT: I will sustain the objection, first, because it is irrelevant under the issues made up in this case. The objection will be sustained to Def'ts' Iden. No. 1.

Mr. McBRIDE: We ask an exception to your honor's ruling.

The COURT: Exception allowed.

Mr. McBRIDE: We will make the same offer as to the appointment from the Spokane & Palouse railroad.

The COURT: Make your offer and the court will rule upon it.

Q. Mr. Stone, how long have you been engaged in the business of cutting ties and furnishing ties to railroad companies in this section of the country?

A. Since 1885.

Q. Are you familiar with that section of country lying between Marshall junction and Kootenai county, Idaho, or rather the section between Cheney, Washington, and Kootenai county, the section where these railroad ties were cut?

A. I am.

Q. I will now ask you to state whether there is any suitable timber for railroad ties at any point nearer to Marshall junction than the region of country where those ties were cut.

A. There is not.

Q. Is it the nearest available tie timber to that point?

A. It is.

77 Q. State where the nearest available tie timber is to the Washington Central railroad line—state, if you know, where it is.

A. Yes, the Idaho line.

Q. State where it is.

A. Kootenai county, Idaho.

Q. Where is the line of the Washington Central—where does it run?

A. It starts from Cheney.

Q. And runs in what direction?

A. Runs to Coulee City, Washington.

Q. What direction, in a general way, I mean?

A. It is a little north of west, perhaps west—a little northwest.

Q. Are you acquainted with the character of the country along that line of railroad?

A. I am as far as Davenport.

Q. Where is the nearest available tie-timber for construction purposes, Mr. Stone, for ties for use in construction along that line of road?

A. Kootenai county, Idaho.

Q. Is there any available tie-timber along that line of that road?

A. There is not, sir.

Q. For the construction of that road would it be necessary to bring the ties from the distance you have stated to the line of road, that is, to the vicinity of the road itself for construction purposes?

A. It would, sir.

78 Q. Would it be necessary to bring all the ties for use in its construction from the distance stated to the vicinity of the road itself, in order to construct it through the country through which it is constructed?

A. It would, sir.

Q. Can you tell about the distance that section of the country where this timber was cut is from Marshall junction to the nearest point on the Spokane & Palouse railroad?

A. Yes, sir.

Q. About how far is it?

A. Do you mean to the first point, the nearest point to where this timber was cut, Judge?

Q. To any point on that line of road.

A. Well, it is sixty miles from Marshall to Granite station.

Q. Is that west or easterly point?

A. Yes, sir.

Q. Now, how far is it to the nearest point?

A. About twenty miles.

Q. Now, from Cheney, the nearest point on the Central Washington, how far is it?

A. The nearest point would be about twenty-nine miles—yes, the nearest point would be about thirty-four miles, or thirty-five, I believe, from Marshall junction to Cheney.

Q. And what is the greatest distance to where the ties were cut?

A. About sixty-five miles.

Q. What did you do in the matter of getting out these ties that you furnished to these companies?

A. The ties were all cut by contract, furnished to me by contract.

79 Q. Mr. Stone, now coming to the question about the timber—the saw-logs—were you getting any timber for lumber?

Cross-examination by Mr. WINSTON (relating to the question of railroad ties):

Q. Mr. Stone, where does the Central Washington railroad begin—at what point?

A. Cheney, Washington, is what I understand.

Q. Where does it run to?

A. I have never been further than Davenport—to Coulee City.

Q. Can you, then, state to this jury that along the line of this road, from the beginning to the end of its line, under that information, that there is no timber adjacent to it?

A. There is no tie-timber.

Q. How do you know if you have never been there?

A. The timber used by the Central Washington and the Spokane and Palouse railroads is tamarack and fir, and there is none along its line of road.

Q. You say you don't know where it runs to; that you have never been there?

A. What runs to?

Q. The Central Washington. You said in your direct testimony that you never had been over the line of this road at all yourself?

80 A. I have been as far as Davenport.

Q. I just asked you if you knew where that road runs to and you said you didn't know.

A. I said I had only been as far as Davenport, Colonel.

Q. Do you know where it runs to?

A. Not by going up there.

Q. Do you know whether there is any tie-timber anywhere adjacent to that railroad?

A. I know that there was no timber so far as I have reports which I found in the surveyor's office—no timber at all of tamarack and fir.

Q. Do you know that personally?

A. I know that personally; yes, sir.

Q. Where does this Spokane & Palouse railroad begin?

A. The Spokane & Palouse, I think, at Marshall junction.

Q. Where does it run to?

A. One line runs as far as Moscow and Genesee; another one runs—way beyond Moscow quite a little distance.

Q. I will ask you if there is any timber adjacent to its line of road?

A. Not of tamarack and fir.

Q. I will ask you if there is any timber that can be used for ties adjacent to the line of the Spokane & Palouse railroad, anywhere along its incorporation, from beginning to end?

A. There is no tie-timber—that is, no tamarack and fir.

81 Q. I will ask you if there is any tie-timber at all along the line of that road, without any reservation.

A. I think not. What I mean to say is that they were not using—there was none used for ties of that character, nothing but tamarack and fir.

Q. Do you know, sir, whether there was any tamarack and fir anywhere adjacent to the line of the Spokane & Palouse railroad, between the points from which it is incorporated to run, do you?

A. So far as my knowledge goes, there was not, sir.

Mr. JAMES MONAHAN, called as a witness for the defendant, and having been duly sworn, testified as follows:

Examined in chief by Mr. MCBRIDE:

Q. Where do you reside?

A. Spokane.

Q. How long have you resided there?

A. In the city, 8 years.

Q. How long have you resided in this section of the country?

A. Thirty-three years.

Q. Are you acquainted with the country known as the eastern Washington and the northern Idaho, the general nature of the surface of the country?

A. With most of it, yes, sir.

Q. You have been over most of it, have you?

A. Yes, sir.

Q. Are you acquainted with the section of the country through which the Northern Pacific railroad runs?

A. Yes, sir.

82 Q. What has been the nature of your business during the time that you have been here, principally?

A. I have been in the contracting business, real estate, etc.

Q. Have you been in the timber business any—that is, in the lumbering business and timber business?

A. Well, I was in the timber business some in building the Spokane Northern.

Q. Are you acquainted with the timber in northern Idaho and eastern Washington, along the line of the Northern Pacific, Central Washington and Spokane & Palouse R. R.?

A. Yes, sir.

Q. Are you acquainted with the timber resources, the resources of timber for ties in this section of the country, with reference to those roads?

A. Well, to a certain extent I am, yes, sir.

Q. Do you know where the Central Washington railroad line runs?

A. Yes, sir.

Q. You know the line of road, do you?

A. Yes, sir.

Q. Do you know where the Spokane & Palouse railroad runs—where it begins and ends?

A. I know that it runs—I think I know where it runs, but I don't know that I know where it ends. I know where it begins, but I have not been on the road so I can't state exactly, but I know that it is somewhere in the Genesee country.

Q. You have been in that country, have you?

A. Yes, sir.

83 Q. You have been where both of these roads run?

A. Yes, sir.

Q. I will ask you to state where is the nearest available tie-timber, timber for ties, for construction for these two lines of road, the Central Washington and the Spokane & Palouse railroad, these two lines of road.

Mr. WINSTON: That is objected to so far as to the word available.

The COURT: The objection is overruled.

A. I would consider the best tie-timber and the most available of all to be in Kootenai county.

Q. In the Kootenai region?

A. Yes, sir.

Q. Do you mean by that that it is the best timber or is it the most available—the nearest? I want you to state why you state that point as being the point the most available.

A. I think that it is the best timber. It is tamarack and fir, and that is considered the best timber for ties. All the timber that is scattered down this way is principally pine.

Q. How is that timber regarded for ties for railroad purposes?

A. It is hardly considered good for railroad ties.

Q. Is there any such timber as is fit for ties nearer than the point you have referred to in Kootenai county on either of these lines of road?

A. Well, no, not to any great extent. There is some scattered bull pine up this Hangman's creek where the Spokane & Palouse R. R. runs.

84 Q. Is that of the quality you have referred to as being good for railroad ties?

A. No, sir, it is not tamarack or fir.

Q. Is that good for ties?

A. No, sir.

Q. Why is it not good for tie-timber?

A. Well, it won't last as long as the other.

Q. Then it does not make so good railroad ties, does it?

A. Well, when it is first put down it probably would be as good as any other, but pine will rot very rapidly, and the other will last longer, and holds its strength better.

Q. Pine is a soft timber and won't hold its strength, nor will it preserve any length of time?

A. Exactly.

Mr. MCBRIDE: You may take the witness.

Cross-examination by Mr. WINSTON:

Q. Where do you understand the Spokane & Palouse to begin?

A. I understand it begins at Marshall.

Q. And goes where to?

A. To Genesee, I believe.

Q. Another branch of that road goes to Colfax, does it not?

A. No, sir, I do not think that there is any branch goes to Colfax.

Q. It goes to Moscow and then on to Colfax, does it not?

A. No——

85 Q. If that road goes anywhere else you don't know of it—you only understand it to go to the places you have mentioned?

A. That is all.

Q. Now, is it not a fact, Mr. Monahan, that between Palouse, between Marshall junction to Genesee you go by Palouse city, do you not?

A. Yes, sir.

Q. There is quite a good bit of timber around Palouse city, is there not?

A. I never have been over the road since it has been built; I have been all over that country before the road was built, but I have not been up to Genesee on the road.

Q. That timber around Palouse city is good pine timber, is it not?

A. I do not know where Palouse city is located exactly, but I know that section of country.

Q. Did you ever hear of any mills down there at Palouse city, lumber mills?

A. Yes, sir.

Q. There was quite a boom on account of the lumber mills down there—quite a number of booms along the river?

A. Yes, I understand they have built along the Palouse river.

Q. When you get to Moscow there is quite good timber along there, is there not, quite a good deal of good timber?

A. I have never been over there since the road was built. I have never been over the road that went there.

86 Q. You cannot tell, you say, whether this road only runs from Marshall junction—you do not know whether it goes on to Moscow, do you?

A. I do not know it if it does.

Q. You do not know where these places on the road are, then, do you, Mr. Monahan?

A. I know that there is a Moscow over in that country, but I have never been over there since there was a road there. I have not been over there since the road went there.

Q. Have you ever been to Genesee?

A. I have been where Genesee is; I have been over all that country, but not over the railroad line.

Q. Do you know where the Washington Central R. R. goes from and to?

A. Yes, sir.

Q. Where?

A. The Washington Central R. R. starts at Cheney and goes to Coulee City.

Q. It stops there, does it?

A. I understand it so.

Q. Have you ever been there?

A. Not since the road went there. I have been all over that section of the country before there was any road there.

Q. Then you do not know whether the road along its charter line goes there or not, do you?

A. I know where Coulee City is.

Q. You do not know whether the Central Washington R. R. is chartered to run from Cheney to Coulee City except what you have been informed—you do not know personally that it runs there, do you?

87 A. I do not know anything about that.

Q. I believe you stated, Mr. Monahan, that you had been in various businesses since you have resided here. I will ask you to state if you have ever been in the newspaper business.

A. I am sorry to say—I forgot about that—excuse me.

Mr. WINSTON: That is all.

Redirect examination by Mr. MCBRIDE:

Q. What is the character of the country over there where you understand Palouse city is—the Palouse country, and the country where Genesee is located? I mean what is the character of the timber, as to its being tie-timber country?

A. My recollection is that it is principally a prairie country with patches of bull pine growing here and there in different places.

Q. There is no tie-timber country down there?

A. No, sir; not that I know of.

Q. How is it in all that direction in the Palouse country?

A. It is my recollection of that part of the country that it is prairie with small patches of scrub pine in the canyons. I have never been over there since there was a railroad running through.

Q. You have inspected that whole country, visited it, before there was any railroad there?

A. Yes, sir.

Q. You have been over there before?

A. Yes, sir.

Mr. MCBRIDE: That is all.

88 Cross-redirect by Mr. WINSTON:

Q. You are acquainted with the country surrounding Palouse city. Now this timber that comes floating down the Palouse river—you are acquainted with that river, you said?

A. Yes, with part of it.

Q. You understand there are booms down there every spring?

A. So I have heard.

Q. You are acquainted with Palouse city?

A. Oh, yes, it is a little town there.

Q. In floating these logs down in those booms there in the spring of the year down to Palouse, do you know where those logs come from?

A. The timber comes from the source of the Palouse, I presume.

Q. Does it not come from Nez Perces county, Idaho, in Lolo creek to the Palouse, sir?

A. I do not know, sir; I presume it could pass through into the Palouse.

Q. Is there not a good deal of tamarack up there?

A. I have never been in the Lewiston country, sir.

Mr. WINSTON: That is all.

Mr. MCBRIDE: That is all.

Examination of Mr. Monahan closed.

And thereupon the defendant- offered in evidence an appointment by the said Spokane & Palouse Railway Company, appoint-
89 ing John H. Stone as its agent to take timber for construction purposes, from some public lands of the United States, as it was lawfully authorized to take. Said appointment was signed by the officers of said company, and was in force at the date of the wrongs alleged in the complaint; also a like appointment as agent of the Central Washington Railroad Company during said time. To this evidence the plaintiff objected on the ground that it appeared that the lands upon which it is alleged that said timber was cut were not adjacent to the lines of road to be constructed, and that such authority to defendant Stone, by said companies, was no defense for taking the timber alleged, and therefore irrelevant and immaterial. The court sustained the objection and excluded the testimony. To which ruling and decision the defendants, by their counsel, excepted. Afterwards, and before the close of the testimony on behalf of the defendants, the said appointments were again offered to be read in evidence by the defendants, on behalf of defendant Stone, for the purpose of showing that said defendant Stone acted in good faith and under the belief that, as agent of said railroad companies, he had the right to take the timber in question, or any part of it, from the lands of the United States in the region from which it was alleged to have been taken, and that such testimony was proper for the consideration of the jury in estimating any damages which they might find against the defendant-. The court, on the plaintiff's objection, refused to receive the offered testimony, and excluded the same from the jury; to which ruling and decision the defendants then and there excepted, and the exception was allowed.

90 It appeared from the testimony of the plaintiff and of the defendant, by numerous witnesses, that the timber which was cut for saw-logs and lumber purposes and sold by the defendant Stone was from subdivisions of even sections of lands within the Northern Pacific Railroad land grant, upon which persons had entered, claiming the same under homestead or pre-emption laws, and had made homestead and pre-emption filings on the same. It appeared from said testimony that the said Stone had purchased from these persons about nine million feet of saw-logs at the market price; that those logs were purchased of claimants who were then residing upon the lands claimed by them, and had been filings in

the land office as claimants of the same in regular form. It also appeared from the testimony that in all the instances in which the plaintiff claimed the taking of the timber was unlawful, the claimants had since left said lands. It also appeared from the testimony that a large portion of the railroad ties which the defendant Stone had furnished to said company were cut on unsurveyed lands, and that the surveys of the same were not made until after the ties were cut and delivered. The defendant objected to the testimony as to ties cut from such lands, on the ground that the same was not unlawful at the time. The court overruled the objection and admitted the testimony; to which ruling and decision the defendant, by his counsel, excepted.

Evidence was introduced tending to show that of all the log timber that was alleged to have been cut upon the even sections and was sold to defendant Stone, the parties so cutting and selling
91 the same were residing upon their respective tracts of land, claiming the same as pre-emptors or homesteaders, with the intention, in good faith, to prove up on the same, and procure title to said lands from the Government of the United States, and in no instance was there any proof that the said Stone bought any such timber from any person not residing upon or claiming his land under either the homestead or pre-emption laws, at the time of such purchase. And the said Stone, when upon the witness stand, testified that upon his part, before he purchased any such timber from any of said settlers, that he made inquiries and diligent investigations of the facts, and satisfied himself that each and every one was actually residing upon his claim, and was a *bona fide*, actual settler upon the land from which he cut and sold the said timber to the said Stone, and upon cross-examination said witness testified as follows:

Mr. JOHN H. STONE, cross-examination continued in relation to saw-logs cut from lands of pre-emptors and homesteaders, testified as follows:

Cross-examined by Mr. WINSTON:

Q. Do you know Charles Shaw?
A. I have seen Charles Shaw, yes, sir.
Q. Have you ever been on his place?
A. I was on Charles Shaw's place in 1886 and 1887——
Q. Was he living there then?
A. Well, yes, I think he was—I think he had settled there then.
Q. I will ask you if you know where his claim lay.
A. I think he had a claim on sec. 2, town. 53, 3.
92 Q. He showed you his filing papers, did he?
A. No, I would not say that Mr. Shaw ever showed me his filing papers.
Q. You are sure he was living there in 1886?
A. I said I thought so. I do not know in 1886, it may have been in 1887, I was there; he was there in 1887.
Q. You think he was there in 1887?

A. Yes, sir.
Q. Was he there before September 14th, 1888?
A. That I could not say.
Q. Were you on his place in 1887?
A. I was there in section 2 in 1887.
Q. Were you on his place in 1887?
A. I would not say now.
Q. Were there any improvements on his place in 1887?
A. I could not state the date.
Q. Were there any improvements on his place when you were there?
A. Yes, I think I saw a house there on Shaw's place, and a stable—quite a large stable.
Q. Was there any house there at the time you purchased this timber?
A. I never purchased any timber from Shaw.
Q. You never got any from Shaw?
A. I never purchased any from him.
Q. You never got any from his place?
A. No, sir.
Q. Do you know Martin J. Gillis?
A. Yes, sir.
93 Q. Have you ever been on his place?
A. I have, sir.
Q. When did he settle there?
A. Well, that I don't know—when he settled there. I do not know that I could tell you the date of his filing papers. The first time that I saw his filing papers was when he came to sell his logs that were then already lying on the ground.
Q. Did you see his filing papers then?
A. Yes, sir.
Q. Had you been on his place prior to that time?
A. No, sir.
Q. Do you know Hiram Price?
A. Yes, sir.
Q. Did you buy his timber, or some timber of him?
A. Yes, sir.
Q. Did he show you his filing papers?
A. Yes, sir.
Q. Had you ever been on his place prior to the time you purchased his timber, or the timber off his place?
A. I had passed his place about that time or prior to that time.
Q. Have you been on his place since that time?
A. I passed by his place about that time; the date I could not give. I know I was over by his place.
Q. How long had he been living there at the time you bought that timber?
A. Well, Price, I think, put his house up there in the fall of 1888.
Q. How long had he been living there at the time you bought that timber from him?

94 A. Well, I could not state how long he had been living there—that would be impossible.
Q. When did you buy his timber?
A. Along about August, 1889, I think.
Q. About the same time you bought Gillis' timber?
A. About the same time, I think.
Q. Do you know Alex. McDonald?
A. I have seen Alex. McDonald.
Q. Were you ever on his place prior to the purchase of his timber?
A. I never purchased any timber from McDonald.
Q. Did you ever get his timber?
A. I got some timber that came from section 5; that is the place you refer to, probably.
Q. Have you ever been on his place?
A. No, sir; I never was.
Q. Do you know Thomas J. Enbody?
A. Yes, sir.
Q. Did you ever purchase any timber from him?
A. No, sir; I never did.
Q. Have you ever been on his place?
A. No, sir; I never have.
Q. Do you know Edward Noel?
A. No, sir.
Q. Did you ever purchase any timber from him?
A. No, sir; not a foot.
Q. Nor from his place?
A. No, sir.
Q. Never purchased any from his place?
A. No, sir.
Q. Do you know Andrew Coff?
95 A. Yes, I think I have seen Mr. Coff.
Q. Did you ever purchase any timber from him?
A. No, sir, his name is not on our books.
Q. Nor from his place?
A. No, sir.
Q. Do you know John Powers?
A. Yes, sir.
Q. Did you ever purchase any timber from him?
A. Wait a minute—(consults book)—yes, sir, 202,889 feet.
Q. Had you ever been on his place prior to the time that you bought this timber from him?
A. No, sir.
Q. Never before you bought the timber?
A. No, sir.
Q. Do you know W. E. Frazier?
A. Yes, I know William Frazier. It may be W. E. Frazier. He is called Bill Frazier.
Q. Did you ever purchase any timber from him?
A. Yes, sir.

Q. Had you ever been on his place prior to the purchase of this timber?

A. I had satisfied myself that I had the right to purchase it.

Q. Had you ever been on his place prior to the purchase?

A. No—no.

Q. Have you ever been on his place since the purchase?

A. No, sir.

Q. Do you know John A. McLeod?

96 A. Yes, sir.

Q. Did you purchase any from his place?

A. No, sir.

Q. You never bought any from his place?

A. No, sir.

Q. Do you know Andrew Cosner?

A. Yes, sir.

Q. Did you purchase some from him?

A. No, sir.

Q. Did you purchase some that came from his place?

A. I purchased from McLeod & Cosner, not from Cosner.

Q. Did it come from Cosner's place?

A. They said so, sir.

Q. Do you know of your own knowledge whether it did or not?

A. No, sir.

Q. Have you ever been on his place?

A. Yes, sir.

Q. Had you ever been on his place prior to the purchase of this timber?

A. Yes, sir.

Q. When were you on that place?

A. I was there on Cosner's land in the summer or early in the year 1889.

Q. Was he living there then?

A. Yes, sir.

Q. Did he show you his filing papers?

A. I did not ask for them, no, sir.

Q. You never saw his filing papers at all, sir?

A. No, sir, and never bought any timber from him.

97 Q. You say he was living there at what time in 1889?

A. Well, it was along in the spring or summer; it was at the time that I was putting in the North Pole spur.

Q. You saw his house there then, did you?

A. Yes; when I was up there.

Q. You are positive of that, are you?

A. I am quite positive; yes, sir. I was along his land and the timber was there not so thick, and I went along right by his land when I was putting in the North Pole spur.

Q. Do you know George Stonebreaker?

A. Yes, sir; I am well acquainted with him.

Q. Have you ever been on his place?

A. Yes, sir.

Q. Prior to the purchase of his timber, I mean?

A. Yes; I think so. Mr. Stonebreaker delivered his logs on the track; I had nothing to do with cutting them, but I satisfied myself that he had a right to cut them before I purchased them of him.

Q. Is there any other explanation you want to make with regard to Mr. Stonebreaker, sir?

A. No; that is all.

Q. Well, sir, then we will go to Mr. James Frazier. Do you know him?

A. Yes; I am very well acquainted with Mr. Frazier.

Q. Did you purchase timber from him?

A. Yes, sir.

Q. When did you purchase it?

A. In 1889.

98 Q. What time in 1889?

A. Well, it was some time—I can't say the month it was.

Q. Were you ever on his place prior to this purchase?

A. Oh, yes; it was right close by our camp.

Q. He was your foreman, was he not?

A. Yes, sir; he was my foreman; yes, sir; he was foreman for me.

Q. Do you know Charles Fredericks?

A. Yes, sir.

Q. Did you purchase timber from him?

A. Yes, sir.

Q. Were you ever upon his place prior to that purchase of the timber?

A. Yes, sir.

Q. When were you on it?

A. I was over the land that he took up in 1888.

Q. Was he living there then?

A. I think he went on there in the summer—I think it was in that summer.

Q. Was he living there when you were there?

A. Yes; he was there and he was there; I have been on his place several times; I have been at his house.

Q. Did he have a house there on his place in 1888?

A. I think in the summer of 1888——

Q. Was there a house on there and was he living in it at the time you were there?

A. Yes; he was; I went into his shanty to see him.

Q. What time in 1888 was this?

99 A. Well, I would not say the time; I presume it might have been along in the early part of the fall or late in the summer; I did not put the dates down.

Q. On the John Powers place—were you ever on his place prior to the purchase of his timber?

A. No, sir.

Q. Joseph Cosner—do you know him?

A. Yes, sir.

Q. Were you on his place prior to the purchase of his timber?

A. I never purchased any timber from him.

Q. Were you on his place prior to the purchase of his timber as alleged in the bill here, when you say you bought timber from McLeod & Cosner?

A. That I could not state.

Q. Have you ever been there since?

A. Yes, I was over there last summer. It is on the North Pole spur, near by the track.

Q. Was he there?

A. I do not know whether he was there or not; there was some one there.

Q. Who was it was there at that time?

A. I could not tell you who the parties were.

Q. You know Joseph B. Cosner, do you not?

A. Yes, sir.

Q. Will you state whether or not you were ever on his place prior to the purchase of the timber from McLeod & Cosner?

A. Yes, sir, I have been over that property.

Q. Prior to the purchase?

A. Yes, sir,

Q. Was he living there then?

100 A. Yes, sir.

Q. When did you buy that timber?

A. From McLeod & Cosner?

Q. Yes.

A. McLeod & Cosner contracts were with me to deliver the timber on the track.

Q. In what year was that, sir?

A. I have not the contracts here that they made.

Q. Will you be kind enough, sir, to tell me what year this lumber was delivered to you?

A. McLeod & Cosner delivered the timber I think in October, 1890.

Q. You say you were on his place prior to the taking off—or prior to the time of the purchase of his timber?

A. Yes, sir.

Q. Were you there in 1889?

A. Yes, sir, I was there in 1889.

Q. Was he living there?

A. That I could not say; I would not state. I would not state that he was living there then.

Q. Was there any house there then?

A. I would not be positive about that; I would not be positive in regard to that now.

Q. W. G. Powers; did you buy timber from him?

A. Yes, sir.

Q. Were you ever on his place prior to the purchase of that timber from him?

A. No, sir.

Q. Now, Angus McDonald—Angus Monroe, I mean. Did you buy any timber from him?

101 A. Yes, sir, 153,373 feet; yes, sir.

Q. Were you ever on his place prior to the purchase of his timber?

A. No, sir.

Q. Will you state now, sir, whether or not any of these parties are now living upon these lands?

A. That, sir, I do not know; I could not state in regard to that.

Mr. McBRIDE: Objected to.

The COURT: Objection overruled.

Mr. JOHN H. STONE, upon his cross-examination in relation to sawlogs cut from lands of pre-emptors and homesteaders, testified as follows:

Cross-examined by Mr. WINSTON:

Q. Now, you have stated to this jury that all of these men took this land for the purpose of cultivating it, residing upon, inhabiting and improving it for agricultural purposes. Do you say that?

A. I believe they did, sir.

Q. To raise crops?

A. I believe they did. I believe that they intended to make their home there.

Q. Every one of them?

A. I believe so, sir.

Q. You believe that because these men you asked about it generally told you so, didn't they?

A. Yes, sir, and satisfying myself that they were there as actual settlers.

Q. Did you ask them all about their intentions?

A. I satisfied myself of their intentions, sir.

102 Q. Well, now, these men that you asked about their intentions—how about Joseph B. Cosner?

A. Joseph B. Cosner—yes, I saw Cosner's papers, and his work on his place would convince any one of his intentions.

Q. You saw his papers, did you?

A. Yes, sir; I saw his papers, and was convinced from his work there that he was a *bona fide* settler and was there in good faith.

Q. What do you mean by his papers?

A. His filing papers.

Q. Did you not state in your examination as a witness in chief and on cross-examination that you knew nothing about the Joseph B. Cosner claim, and that you had never been upon his land?

A. I do not think I did, sir.

Q. Did you not state that you did not buy any timber from Cosner?

A. No, Colonel. I stated that I got timber from McLeod & Cosner. I saw Joseph B. Cosner's papers, but I bought the timber from McLeod & Cosner.

Q. When, if ever, were you upon the Cosner claim?

A. Well, I expect it was in 1889.

Q. Joseph B. Cosner?

A. In the summer of 1889, although I may have been there in the fall of 1888.

Q. He was there, living there at that time, was he?

A. I think they moved on in 1888; that is my opinion.

Q. You saw his papers then, did you?

103 A. No, although I would not say positively; I think I did not see his papers until some time in 1889.

Q. When did you see his papers?

A. I think in 1889. Cosner came to my office there at the switch and I examined his papers. That was in 1889.

Q. How do you know that it was in 1889?

A. I could not say positively; it probably might have been late in the season of 1888.

Q. Was it as late as September?

A. Well, I would not want to say the date.

Q. Was it a pre-emption claim?

A. That I could not tell you now, sir.

Q. I will ask you now if you have that paper which he showed you?

A. No, sir, I have not.

Q. I will ask you now then if that paper did not state as the date of settlement alleged to have been made by Mr. Cosner on this identical lands was not in the month of October, 1889, sir?

A. I would not state; I would not attempt to state.

Q. If it did so state you would not want to swear that he was there in 1887 or 1888, would you?

A. I do not know that I could, but it is my recollection that he was there in 1887 or 1888. While I would not be sure, that is my recollection, that he was around there in 1887 or 1888.

Q. Now, have you any other evidences of the good faith of this party other than what you have told?

A. Do you mean myself, of my own knowledge?

Q. Yes, sir.

A. I have given you all the information I have.

104 Mr. THOMAS HARLAN, called in the case of United States *vs.* Spokane Fuel Co., and having been duly sworn, testified:

Direct examination by Mr. WINSTON:

Q. Mr. Harlan, the N. E. of 14, the S. W. of 18, the N. ½ of the S. E. of 20, the E. ½ of the N. E. of 22, township 53 north of range 3 west. Did you make any examination of that land with reference to any cord-wood?

A. Yes, sir.

Q. Did you make an estimate of the number of cords you saw cut there?

A. Yes, sir.

Q. How many cords were there?

A. I cannot remember without reference to this (consults paper).

Q. Well, look at this and say if you can now remember how many cords there were?

A. Yes, sir, 1,400 cords in the aggregate.

Q. Take the N. ½ of 14, 52 west. How many cords there?

A. 1,200 cords of wood.

Q. The N. E. of the S. W. and the N. E of the S. E. of 10, 53, 3?

A. Yes, I remember that without reference to anything.

Q. Well, sir, how many cords were there there?

A. 500 cords.

Q. Now, the E. ½ of the S. W., lots 3 and 4 of sec. 18, 53, 3?

A. Yes, sir, I remember that.

Q. How many cords were there there?

105 A. 325 cords.

Q. Who was with you when you made this examination, Mr. Harlan?

A. The last one, do you mean?

Q. All four of them, sir.

A. Frank Ginger was with me on sec. 10, 53, 3. Captain Mathews, Frank Ginger, Burt Kirby (?), and I think Mr. Haley, but I am not positive. They were with me on sec. 18, 53, 3. On the other sections, on 14, 52, 4, Frank Ginger was with me.

Q. Did you see any cord-wood being hauled off this land?

A. No, sir; I did not see any being hauled.

Q. Did you see any after it was hauled?

A. Yes; I saw some after it was hauled.

Q. Where was it?

A. I saw at Ramsey Switch—I saw a good deal of cord-wood there. I saw a good deal in the woods, not hauled, but just corded up, and some of it was not corded up, but just stood up endways in ridges laying along where it had not been corded up at all. We estimated a good deal of it that was just laying up endways.

Q. Were there any improvements on these claims where you saw this cord-wood?

A. Yes, sir; on 18 there was a man lived by the name of McClellan.

Q. That was on section 18?

A. Yes, sir.

Q. What 18 have you reference to?

A. 18, 53, 3.

106 Q. On 18, sec. 18, township 53, 3?

A. Yes, sir; that is the McClelland claim. Sec. 10, no one lived on sec. 10. 10, 53, 3—that was uninhabited at that time.

Q. Was there any appearance that any one lived on any of these pieces of land?

A. Please call my attention to the specific pieces of land—I cannot remember them.

Q. Well, the N. E. of 14?

A. 52, 4?

Q. 53, 3.

A. 53, 3—no, that was not inhabited.

Q. On sec. 18, 53, 3?

A. McClelland lived on 18, 53, 3.

Q. Now, sec. 20, same range and township?
A. That was not inhabited.
Q. On sec. 22?
A. Mr. Frazier lived on that.
Q. Well, on 14, 52, 4?
A. Yes, there were two settlers lived on there—I can't recall their names just now, but I know them.
Q. On sec. 18, 53, 3?
A. That is Mr. McClelland's —that is the one I referred to before.
Q. On sec. 10, 53, 3?
A. No, that was not inhabited.
Q. Was there any cultivation on any of these claims?
A. On sec. 18, Mr. McClelland's claim, there was some plowing.
Q. How much plowing?
107 A. One acre we estimated that.
Q. Was there any crop on?
A. Nothing—it was too new to put crop in.
Q. Was there any cultivation on any of the rest of them?
A. Yes, on the Frazier claim there was a field there.
Q. Was there any cultivation on any of the balance of them?
A. No, sir, not to my memory.
Q. How was this cutting done on the land—that is, how did it appear to have been done as regard- the land? Was it general or otherwise, can you say, sir?
A. Well, on sec. 10, the small trees not suitable for saw-logs were cut into cord-wood. On sec. 18, the large timber was made into cord-wood that all could have been used for saw-logs. On 22——
Q. I meant to ask you, sir, whether the cutting was general all over the section from the appearance of the stumps then standing—could you tell whether the cutting had been generally over the whole section, or quarter of the section, or were there half of them remaining—or part of them, or was it general,—everywheres alike over the section?
A. Yes, it was pretty general—everywhere. It would indicate from the piles in the woods that they had cut pretty generally everywhere, and it indicated that where the large trees were cut into saw-logs that the smaller ones had been made into cord-wood.
Q. Was the land cleared where the cutting had been done?
A. Yes, sir, it was all taken pretty much.
108 Q. Was the land cleared up?
A. No, sir, I did not see any——
Q. Were the tops burned?
A. No, sir.
Q. Were the stumps dug up?
A. No, sir.

Mr. WINSTON: Take the witness.

Cross-examination by Mr. MCBRIDE:

Q. Do you know anything about who did this cutting?
A. No, sir.

Q. How came your attention to be directed to it at all—how did you know that it was Government land at all, or did you know that it was?

A. Yes, sir, I found the even sections—I knew it was Government land.

Q. Was the cord-wood lying there on the ground when you were there?

A. Yes, sir, in many instances it was. It was not on sec. 10. It had been taken away from section 10.

Q. How could you estimate it if it had been taken away? How could you estimate how many cords of wood there were?

A. Well, the way we did, where it was corded up, the way cord-wood is corded up, it would be against a stick 8 feet high—and sometimes we would find the stake there—and then again, where it had been removed we could tell by the ground where the wood had been corded, after it had been removed.

Q. How could you tell how high the pile was after it had been taken away?

109 A. We could not tell exactly, of course, but we supposed that it was not corded less than one cord high; that that had not been removed was of that height.

Q. You say that on sec. 14, 52, 4, was the McClelland claim?

A. 53, 3.

Q. 52, 4, you gave it.

A. No, sir; those are not the right number of the township.

Q. Well, on sec. 14, 52, 4, who lived there?

A. On sec. 14—I do not know who lived there. There were a couple of settlers lived there; had a little house and a little field. I do not know their names. If I ever did know their names I have forgotten them now. That was near Ramsay.

Q. They seemed to be cutting cord-wood there?

A. Yes; there was cord-wood cut there.

Q. Where is the McClelland land?

A. He has the S. W. ¼ of sec. 18, 53, 3.

Q. How much cord-wood did you see there on his land?

A. 325 cords.

Q. Do you know whether he cut it all or not?

A. The old gentleman cut it, he said.

Q. He said he cut it himself?

A. Yes; he said he cut it himself. He did not have it corded up yet when we were there; it was just set up on end to dry, but we estimated the quantity of it.

Q. Was he living there on the land?

A. Yes; he was there on the land.

Q. He had a little piece of ground in cultivation, had he?

110 A. Yes, he had a little piece of land plowed and had a little house there.

Q. Living there in his home?

A. Yes, sir.

Q. In order to put that land in cultivation, to clear it for cultivation, would it not be necessary to cut the wood?

A. Yes; it would be necessary to take off the timber.

Q. Was it necessary to cut it into cord-wood in order to clear it for cultivation?

A. Yes; unless it was burned over. It was necessary to take the timber off in order to plow it.

Q. Col. Winston asked you if the tops and refuse had been burned off after some of this cutting, and you answered no?

A. No, sir, I answered that it had not been, not to my memory. I think you will find that that is my answer, that it had not been to my memory.

Q. Would it not have been a very unwise thing to set fire there in the fall in the timber—would it not have been a dangerous experiment to set fire there in the fall?

A. It would be dangerous to set fire in the dry woods, yes, sir.

Q. You don't know where this wood went nor who cut it, I understand you to say?

A. No, sir, I don't know who cut it only just from hearsay and that a man told me—he told me that it had been taken up to the Spur.

Q. You don't know anything just because you heard it, do you?

111 A. No, sir.

Q. You do not know of your own knowledge who cut it or where it was taken?

A. No, sir.

Mr. McBRIDE: That is all.

Q. You say you don't know anything just because you heard it. You get most of your information from hearing, don't you, Mr. Harlan?

A. Hearing and seeing, yes, sir.

Q. Now the man that you say told you that he was cutting this for some one—who did he tell you he was cutting it for?

A. Well, he said that he was cutting it for the Spokane Fuel Company, that that was banked up there.

(By a JUROR:)

Q. Was this S. W. ¼ of 18 good agricultural land, land you could cultivate and make a home of?

A. Well, it was third-class agricultural land—that is what you would class it if you were classing it, third-class agricultural land.

(By a JUROR:)

Q. How do you class it?

A. By the appearance of the soil that is exposed and the indications of what grows upon it—what crops would grow on this timber land. Some of this timber land would grow crops—this land I think would be good land for fruits and crops—it would produce crops. That is the way I would class it, as third-class land. While it would not be third-class land in Iowa, it would be third-class land in Oregon and Washington, where the lands are not so rich.

112 (Mr. WINSTON:)

Q. Do you mean that it would be if it were irrigated?

A. It would produce some crops without irrigation. What I mean by cultivating it is to plow it, plant it. It would grow some crops without irrigation.

Q. You would have to irrigate it in order to make it first-class land, would you not?

A. Well, I think you would have to do more than that to make it first-class land; I think you would have to put new soil on it in order to make it first class.

Q. Is it land that could be cultivated?

A. Well, it is good land—it would be fair agricultural land if it were reclaimed.

Mr. WINSTON: That is all.

Examination of Mr. Harlan closed.

The testimony having been closed, the defendants requested the court to instruct the jury as follows:

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE *et al.*, Defendants.

The defendant John H. Stone prays the court to instruct the *court* as follows:

There is no proof of the alleged partnership charged in the complaint, and the defendants are therefore entitled to a verdict.

113 THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE, Defendant.

The defendant prays the court to instruct the jury as follows:

First. When a pre-emption or homestead filing has been had, made by a settler duly qualified to make the same, the effect of such action combined with an actual personal settlement on the public land so filed upon, is to sever such land so claimed from the mass of public lands, and subject to the loss of the right of the claimant by failure to comply with the subsequent conditions of the law, the settler becomes the owner of the land; and except as between him and the Government, he is entitled to exercise all the rights of owner.

Second. The legal presumption arising from a lawful entry made upon land by a claimant under the law as a homestead or pre-emption, and occupation as such, are that the claimants acted in good faith, and the burden of proving bad faith and attempting to defraud the Government is upon the plaintiff to show.

Third. If the jury find that the claimants of the land who sold timber cut from the land to the defendant Stone were at the time residing upon it under the homestead act and pre-emption laws, and were so improving their land as to indicate to the jury that

they intended to acquire title by compliance with the law,
114 and the sale of the timber as made under such circumstances as to lead the purchaser to believe that the parties selling it were acting in good faith, then such sale was lawful, and the plaintiff would not be entitled to recover anything for the timber so sold.

The court refused to give each of said instructions; to which refusal the defendant excepted; whereupon the court then proceeded to instruct the jury as follows:

In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES, Plaintiff,
vs.
JOHN H. STONE, Defendant. } No. 86.

Instructions.

SPOKANE, WN., *April* 22, 1893—10 a. m.

GENTLEMEN OF THE JURY: Before touching upon the points in this case directly I will make a few general observations:

The jury is required to decide all questions of fact in the case; you are the judges of what the facts are. In determining what the facts are you are required to base your decision entirely upon the evidence given upon the trial, without being influenced by knowledge that any one of you may have acquired in other ways, and without being influenced by information that may have
115 come to you by other means than through the witnesses and through the testimony which the court upon the trial has decided to be admissible and permitted to be given in the hearing of the jury for the purpose of showing what the facts are.

In making your decision you will be required to confine your efforts to deciding the facts which are put in issue by the pleadings. You have no concern in deciding collateral questions except in so far as they throw light upon the motives and conduct of the witnesses, and enable you to judge of the value of their testimony, and in general to illustrate the facts in the case, but all the points that are involved in the disputed questions are stated in the pleadings, that is, the complaint and answer in the case, and are the only questions which you are called upon to decide, and you should not assume any responsibility for deciding questions that are not before you, and that have not been submitted to you to be decided.

You should throw aside entirely all considerations that may be urged or have been urged to arouse prejudice and to get a decision from the jury on account of other matters that are not in litigation in this case, and attend strictly to your duty as jurors and decide the questions that are for you to decide, and make your decisions upon those questions upon the evidence that has been given you for the purpose of ascertaining what the truth is in regard to these questions.

During the days that this case has been on trial, upon each occasion of adjournment and before permitting you to leave
116 the court-room and to separate from each other, I have rendered an admonition not to converse about the case nor hear anything others might have to say about it—to avoid getting any impression in regard to the case except what comes legitimately upon the trial. I did not carry the directions and cautions to jurors so far as to forbid your reading the daily newspapers. An attempt has been made in the publication of a newspaper in this city to enter upon the discussion of this case and of the facts for the purpose (presumably) of influencing the public mind in regard to the justice of this trial. You, as part of the community, are liable to be affected and influenced in the same way as the balance of the public may be affected and influenced by this discussion of any question in the journals of the day, but I wish to caution you now that your duty as jurors requires you to disregard any impression that may have been created by anything that you may have read in regard to this case or the facts of it in any newspaper. Newspapers are printed by persons concerned in their publication, sometimes for profit, sometimes for the pleasure it gives to the editors and publishers to place their views before the people, to wield the power that is incident to the moulding of public sentiment. Editorials expressed in newspapers are sometimes the honest opinions of the writers and given for the honest purpose of assisting in the dissemination of knowledge and the propagation of true principles. Sometimes they are printed to satisfy the malice and prejudices of the writers and publishers, and sometimes for other consideration. Now, readers of the papers ought not to accept
117 as true everything they see in print, but should discriminate, and so far as a printed argument is reasonable and so far as the truth is therein stated, which can be ascertained by intelligent readers, they may be treated as truth, and argument may be treated as true and as reasonable, and may be considered to this extent, but I wish to caution this jury not to accept any statement made in any newspaper as truth simply because it is printed. You are to ascertain the truth by what is sworn to on this trial. In regard to the reason and justice of this case you are to determine in accordance with the truth as you find it by the sworn testimony, and in accordance with the law as I give it to you.

In the trial of a cause parties on each side are entitled to be represented by counsel. It is the province of the attorneys to prepare the cases, prepare the pleadings from the issues, and to ascertain what evidence is to be produced in court before the jury, and to discuss and to debate the questions involved before the court and jury. The task of the attorneys is an important one, and it is performed as a sworn duty by these gentlemen who are sworn officers of the court. On each side they are required to take care of their own side and in the zeal of debate they sometimes step beyond what is actually required of them, but they are excusable for that on account of the desire which they have to make all there is to be made for their clients. They are excusable, I say, so long as they keep

within the limits of moderation of what seems to them to be the justice of the cause which they advocate. They sometimes
118 bring to the attention of the jury facts and considerations calculated to arouse prejudice rather than illustrate the truth. Now, it is the duty of jurors to be impartial. Not to disregard what the lawyers say in argument because it comes from the lawyers, but to give to each its true consideration, and so far as it is reasonable let it have its influence in deciding the case. But the jurors should be impartial and unprejudiced. You are to judge between these gentlemen who debate the cause before you, accept what is right and reasonable on either side and reject everything else.

In determining the facts from the evidence there are certain rules which should guide you:

The first rule is that in determining any fact all the testimony in the case bearing upon that fact would be considered, and so far as you are able the testimony should be harmonized, and when the determination of a fact can be made to harmonize with the evidence that plan should be adopted, but when you find that there is in regard to any fact in the case such a conflict in the testimony that you cannot believe that one statement of witnesses is true without at the same time finding that other statements of other witnesses are necessarily untrue, then it is your duty to put all the testimony on each side in the scales and weigh it and determine which is more probable and reasonable, and which to your minds is the facts shown by the preponderance of the testimony.

In weighing the evidence, the amount of it, that is the number of witnesses testifying who corroborate each other against
119 the opposing evidence must be taken into account, but it is not conclusive. It is not necessarily true that because there are witnesses, two or three or four on one side and a lesser number opposed, that the truth is with the majority, although there is less probabilty that a number of witnesses will be mistaken or falsify than that a single witness or a lesser number will be so mistaken or falsify. That is a mere matter of probability, and there may be other conditions or circumstances which would justify the finding of the jury to be with the majority, so that you, under the rules, will determine what the truth is, give the testimony careful consideration and all the circumstances in the case.

Witnesses who appear to you to be influenced by being (interested?) in the questions to be decided, their testimony is to be taken with allowance. You must consider the fact that they are interested, and the fact of their contradicting disinterested witnesses should also be taken into account, but it is not necessarily conclusive because a man is interested that he has given testimony untruthfully, but it is one of the things to be thrown into the scales on one side or the other in order to ascertain upon which side there is a preponderance.

The manner in which the witnesses behave in your presence in giving their testimony is a circumstance to be taken into account; the character of man the witness shows himself to be, whether he is habitually honest and truthful in his conduct, or whether he has

been reckless in his conduct in business matters and in regard
120 to his speech and behavior, may be taken into account. Then the testimony itself should be considered as being of the most important in determining whether it is true or not, and should all be carefully considered, to determine whether it is in itself plausible and probably true, or whether there are inconsistencies in the statements of the different witnesses in giving their testimony which are hard to reconcile, whether the statements of the witnesses on the one side are necessarily in conflict with all of the facts in the case—all of these things are to be taken into account in weighing evidence. Under these general rules you should consider all the testimony and determine what the facts are as shown by the testimony, and in coming to your decision you should be guided by this further rule:

The party who alleges the fact and undertakes to establish the case by reason of certain facts which he says exist, has resting upon him the burden of proof, and he is required to establish what he alleges by evidence sufficient to outweigh all the evidence to the *contract*, and unless there is a fair preponderance in his favor the jury should render a verdict against him, although they may not be certain but what his statements were true. If the evidence should be evenly balanced, and there was not a fair preponderance on either side, you should give your verdict against the party who has the affirmative, that is, the one who alleges the fact, and not the one who denies.

In the testimony there has been reference made to some incidental matters like, for instance, proceedings in the court at Boisé, the indictments of Mr. Stone and other persons whose names
121 have been made use of in this trial. Now, I admitted that testimony, although I have ruled in this case that the decision of the court at Boisé cannot control the decision of the court in this case. The reason and the manner in which this testimony was admitted are as follows:

The Government called here a witness named Mr. Anderson to testify in regard to facts which are material in this case now, in connection with Mr. Anderson's testimony that he had been taken from his pre-emption claim in Kootenai to Boisé by process of the United States and had been detained there for a time. The testimony in regard to Mr. Anderson was material as affecting the question that was being contended about, whether Mr. Anderson was a *bona fide* settler on his claim in Kootenai county or not. And you have a right to consider that for that purpose and for no other. The Government was contending that Mr. Anderson was not a settler in good faith, and one of the circumstances that he was not a settler in good faith was the fact that he had ceased to reside upon the land. The defendant met that suggestion by showing when and under what circumstances he left the land to show that he had an excuse for leaving it. You will take the circumstances into account in determining what value as evidence of his good intentions—his honest intentions as a settler upon public land—is to be attached to the fact that he has ceased to live there and ceased to make it his home.

And so other witnesses have been questioned about the proceedings in Idaho and have been allowed simply because of its bearing incidentally upon the questions which are in this case to deter-
122 mine what, if any, motive or animus might be actuating the witness. Testimony in regard to the finding of these indictments was elicited in the cross-examination of Mr. Haley, and I permitted these questions to Mr. Haley showing the circumstances of these indictments because it is one of the matters you may take into account in determining the value of Mr. Haley's testimony and weighing it in this case with the other testimony. And if the jury that tried the indictments in Idaho found that the defendants were not guilty you are not bound by their opinion of the matter; you are called upon in this case as sworn jurors — in accordance with your own judgment as to what is the truth in regard to the matter. The decision of another court in another kind of a proceeding, at another time, should not weigh with you a particle.

Also I have admitted the testimony of Mr. Monahan and other witnesses in regard to the location and situation of the Central Washington and the Spokane & Palouse railroad, the distance it is from the land where it is claimed that some railroad ties were cut, as an incidental matter here bearing upon the admissibility of other testimony which the defendant was offering for the purpose of supplying the information necessary to enable the court to decide whether the land on which it is claimed that railroad ties were cut were adjacent lands to said railroads within the meaning of the statute of the United States authorizing railroads to take materials of earth, stone, and timber from the public lands adjacent to the line of their road for construction purposes, but you will not allow the testi-
123 mony of Mr. Monahan in regard to the situation to affect your decision of the meterial facts in this case. You are not called upon to decide whether these lands are adjacent to this railroad. That is a question of law, and it is for the court to give the proper construction to the acts of Congress. This claim that is made here that because the United States has authorized railroads to take timber from lands adjacent to their roads is for the court to pass upon and decide what rights are conferred upon the railroad corporations in this case, and it is for the court to decide what, if any, right or authority Mr. Stone had by reason of any commission or authority given him by these railroad companies to go upon the public lands and take timber.

The act of Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad that the railroad company has a right to require the United States to provide them with material or go upon distant lands and procure the meterial that they require. That is not the scope of the law, and so I have decided that adjacent lands means lands in proximity, contiguous to or near to the road, and that lands so far distant from the railroad and mentioned as the lands in Kootenai county, Idaho, where it is claimed that rail-

road ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration and releases you from any consideration in regard to it.

124 I will now state what are the issues in question here which you are called upon to decide:

The Government of the United States is plaintiff in this case, and by its complaint claims to have been the owner of certain timber by reason of that timber being situated upon the public lands of the United States. It claims, in the second place, that the timber which was Government property has been taken away from the public lands, and third, that the defendant, Mr. Stone, received that timber and that he has converted it to his own use; that he has disposed of it, and also that the Government has been deprived of its property in the timber, and in the next place that the timber was of a certain value.

Now, all of these things are material allegations and are made by the Government of the United States in its complaint, and are necessary to be established by proof to entitle the Government to a verdict for any sum.

You must find that the Government owned the timber; you must find that the timber has been taken by somebody, and must find that Mr. Stone, the defendent, received it and has converted it to his own use, and you must find its value in order to determine what amount, if anything, the Government is entitled to recover in this case as compensation for what it has lost by being deprived of its property in this manner. I say you must find from the evidence that these facts are proven, because the defendant has denied these facts, and has by denying made an issue as to all of these facts.

125 In regard to the saw-logs, proof has been adduced by the Government in support of its case that upon certain specific tracts of land timber was cut and delivered to Mr. Stone, and that he sold and received the money for it. The amount of timber taken from these particular tracts of land has been testified to, but there is a discrepancy—a dispute between the witnesses in regard to the exact amount of timber that has been taken, but it is undisputed by any testimony in the case that some timber was taken from certain tracts of land specified in the complaint and in the bill of particulars. These lands have been described to you and I will not undertake to enumerate them in detail, but as to some of the lands about which this litigation is being carried on it is undisputed that some timber was taken and received by Mr. Stone and disposed of. Now, it is not claimed that he has ever paid the Government for this timber, and if you should find from the evidence, under the rules which I will give you, that these specified lands are public lands within the meaning of that term as it is used in the statutes of the United States—that is, lands which the United States has title to and are in the possession of—the Government will then be entitled to a verdict at your hands for whatever sum shall be found by you to be the value of the timber. In order to show that these lands are not public lands of the United States the defendant has

introduced evidence tending to show that the particular lands had been acquired by individuals under the laws of the United States and that they had acquired special and exclusive rights in these lands, and that under the exercise of their individual rights the timber when it was cut off these lands was not the property of the United States, but was the property of the men who cut it.

126 That requires me to define to you the principles of law which governs the right of property in public lands, the right of property which the Government has in these public lands, and the rights which individuals may acquire under the laws of the United States. The United States is as to all of the lands in the State of Idaho the primary source of title. The title for all of the lands in that State is founded upon the title of the United States. Where individuals have acquired ownership of lands they have acquired it by grant of conveyance of title from the Government, because the Government is in fact the original owner of all of it. If you were going to prove that you own a piece of land in the State of Idaho and were called upon to prove and satisfy a man who wanted to buy it, for instance, that you were the owner of it, you would have to show by a series of conveyances from the United States that the title had come to you from the United States, and when you had gone that far—that is, as far as the Government title—you could go no further because that is the highest source of title. In a case where the question of title is involved if there is no evidence of any transfer from the United States of the title it is to be accepted as a fact that the title is in the United States.

As to all of the lands in which the title is in the United States the timber and trees that are standing and growing there are part of the land, and the Government has title to those trees the same as in the soil.

When trees are cut down without authority of law the right of property in the timber after being severed from the realty

127 still remains in the Government; and if any one without license from the Government or authority of law takes the timber from the lands, he commits a trespass against the Government. No person can acquire title to the timber so cut by buying it from an individual unless it is shown that that individual in cutting it and removing it from the lands had license and lawful authority to cut and remove it. That is on the same principle that a man cannot acquire title to any piece of property by buying it from a man who don't own it.

Formerly the laws of the United States provided for the sale of public lands. The President was authorized to appoint a time for the sale of lands within a certain district, and give notice of it, and there was what is termed a public sale, similar to an auction sale. If there was a particular piece of land that was desirable and several people wanting the same piece of land, the Government would sell the land to whoever offered the most for it, and then all of the lands that remained unsold after that public sale, the law authorized others to purchase at what was termed cash entry, or private entry. A man could go to the land office and buy it from the Gov-

ernment by paying cash for it at the minimum price which was fixed by law. But the policy of the Government has been changing gradually until now it is the settled policy of the Government instead of selling the land at the minimum price, to endeavor to distribute it among the people in such manner as will benefit the people themselves to whom it is given and to give it in limited quantities to the men who will appropriate it for the purpose
128 of homes. And at the present time lands within the limits of the Northern Pacific R. R. grant cannot be bought by by cash entry. Mr. Stone could not buy the lands referred to in his testimony in this case for $25,000, or for any sum. The most that any individual can acquire title to is 160 acres under the present laws. Under the laws in force during the time referred to in the pleadings, and in the evidence in the case, it was required that any person to acquire any part of the lands known as the public lands that he should prove that it was for his own exclusive use and benefit, and for the purpose of residing upon it and cultivating it. He could only acquire it by making proof that such was his intentions, that he was taking it for the purpose of residing upon and cultivating it, and thus carry into effect the policy of the Government in giving the lands to people who needed it and will cultivate and use it so as to cause the greatest benefit to the people of the country. Any settler who goes upon a tract of land with that intention goes by invitation of the Government, and he is authorized by law to improve the public lands and put it under cultivation and make it fit for his use. He is authorized to cut down the timber that he finds standing there (if it incumbers the ground) as far as it is necessory to remove it in order to make the land fit for cultivation. And timber that he does cut down in good faith and for the purpose of improving the land, where he is a *bona fide* settler intending to acquire title in accordance with the laws of the United States, after it is cut is not the property of the United States, but is his property. He may burn it up or he may
129 sell it for money, and if he sells it under those conditions the man who buys it from him gets a good title to it and is not required to pay the United States for it afterwards.

The converse of that proposition is true, and where a man cuts timber off the public lands unless he is a *bona fide* settler, intending to acquire title to the lands by obedience to the laws of the United States, does so unlawfully, and does not make himself the owner of the timber by cutting it, and even a settler who takes up a claim on public lands intending to perfect his right to it until he has perfected his right has no right to cut the timber except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate.

A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plow shall follow the axe, and that the entire forty acres shall be put to use for the

purpose of cultivation or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith.

130 But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the pre-emption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation.

As between the Government and the settler, the title to the land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected.

The fact that claimants to lands under the homestead and pre-emption laws after occupation for a time abandon the lands is not alone proof that they intend to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the in-

131 tent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that claimants of the land were acting in good faith at the time they sold the timber and the purchaser had no reasonable grounds to believe otherwise, then such sale would be lawful.

In regard to the railroad ties some evidence has been offered here tending to prove that ties were cut on unsurveyed lands; that surveys have been made since, and it has been ascertained that some of the lands upon which ties were cut are in even-numbered sections, that is, on lands not included in the grant to the Northern Pacific R. R. Company—on public lands. All of the ties that were cut on even-numbered sections or sections that have since been ascertained to be even-numbered sections are to be considered as having been cut on the public lands to which the Government had title, and to all of that timber, that is, the tie-timber cut on even-numbered sections (if you find from the evidence in this case that any were so cut on even-numbered sections), the Government is entitled to recover in this action against the defendant, Stone. It will be for you to determine whether this evidence as to the cutting on even-numbered

sections is true or not, and if the timber was cut on even-numbered sections and made into railroad ties and delivered to Mr. Stone it will be for you to find how much if anything it was worth and render a verdict in favor of the Government for the value of so much of it as you find that Mr. Stone did receive, no matter who cut it and no matter under what form of contract it was delivered to Mr. Stone.

132 In regard to the cord-wood, that is made the subject of a separate lawsuit. You are trying two lawsuits and will have to return a verdict in each case. For the cord-wood Mr. Stone has been sued in connection with Mr. Kegler and Mr. Noonan. No evidence whatever has been introduced connecting Mr. Noonan and Mr. Kegler with the cord-wood transactions. Mr. Kegler has not even been served with summons and he is not in the court making any answer or any contention, and the Government cannot take judgment against him. Nor can it take judgment against Mr. Noonan, because there is no proof connecting Mr. Noonan with it. If you find for the Government on account of the cord-wood it will be against Mr. Stone only in whatever sum you find the value of the cord-wood to be.

If you find a verdict for the plaintiff you will determine the amount of it in accordance with this measure of damages; the value of the timber, and whatever the Government can recover more than the value of the timber as it stood in the tree on the land depends upon one question, and that is the question of good faith, or an innocent mistake or an honest purpose, and upon the question of an innocent mistake or an honest purpose the law is this: If a man should get the timber where by reason of an innocent mistake as to the ownership of the timber as to the location of the boundaries or in any way in which a mistake might arise, acting in good faith and without intending to take timber which he has no right to take, in a suit against him there should be a recovery for only the stumpage, the value of the timber at the time as it stood in the

133 tree. If he disposed of the timber to another person who had no reason to know or suppose that the timber was unlawfully taken from the public lands, then the same rule would apply to him and the Government would recover in a suit against him simply the value of the timber as it stood in the tree.

If the men who cut down the timber and took it away were wilful trespassers and they sold it to a man who, acting with reasonable prudence in doing his business in purchasing the timber failed to discover that it had been unlawfully taken and bought it, honestly believing that he was buying it from persons who had a lawful right to sell it to him, then although they were wilful trespassers originally, the Government in a suit against the man who bought it in good faith, supposing that he was buying it from the true owners who had a right to sell it, in a suit against him I say, the Government would be able to recover only the amount of the value of the timber, before it was cut, the stumpage value.

But a man who in bad faith takes the property that he knows does not belong to him and bestows labor and invests his means in

improving that property cannot as against the true owner, set up a claim for the value of the labor bestowed upon the other man's property and require that he should be allowed for value he has bestowed upon the property, and the owner as against him would have the right to recover the value of the property at the time of the conversion, without making any reduction whatever for the enhanced value of the labor of the wrong-doer in taking it.

134 Now, under the principle, if Mr. Stone is not a purchaser in good faith of this timber (if you find that he got any Government timber), — will be liable to the Government for the value of the timber at the time of the conversion, and will not be entitled to any reduction for the enhanced value by reason of the labor in cutting down the timber or in hauling it to market, and the Government is entitled to recover the full value at the time, in the condition it was in and at the place *whether* it was at the time he disposed of it.

You will apply these rules for measuring the damages as to the saw-logs, the ties and the cord-wood, in case you find that the Government is entitled to recover any sum whatever on account of either class of timber.

Gentlemen, I have had prepared for your use verdicts in each of these two cases. There are four of these papers. You will select one of them in each case and return into court in accordance with what you determine to be your decision in each case. One of them in each case has been prepared in case you find for the plaintiff, and you will insert the amount which you find the damages to be and have it signed by your foreman. In case you find for the defendant you will take the other form and just have it signed by your foreman and that will make it complete.

Thereupon, the jury retired in charge of the bailiff to consider of their verdict.

Mr. McBride (for the defendant): I desire to note an exception to the ruling of the court as to the question whether a rail-

135 road company can take timber from the public lands for use in its construction being a question of law to be decided by the court. We except to that upon the grounds that the right of railroads organized under the act of 1875 to take timber for construction from adjacent lands is one to be determined by the circumstances of each particular case, and is therefore a question of fact to be determined by the jury from the testimony in the case.

I desire to except to so much of the instruction of the court as limited the right of the settler upon a pre-emption and homestead as to the cutting of the timber upon his lands and that after the timber be cut the land shall immediately - - put in cultivation, and "that the plow must follow the axe."

I desire to except to so much of the charge of the court to the jury as limited the effect of the testimony as to the indictments against Anderson and others at Boisé simply to the question as to the effect upon their settlement upon the lands, and nothing else in the case

I desire to except to all that part of the charge which limited the

effect of the indictments at Boisé so far as they were introduced in evidence.

I desire to except to the refusal of the court to give the instructions asked on behalf of the defendant Stone in the case of the United States against Stone and others upon the grounds that there is no testimony in the case to establish any partnership whatever, and that the suit was against parties as partners and not as individuals, and that there is no proof whatever in the case that
136 any of the cord-wood came from public lands.

Mr. WINSTON (for the Government): I desire to except to so much of your honor's charge as is contained in the instruction to the jury that under the pleadings and evidence in this case they could not render a verdict against the Spokane Fuel Company except the defendant Stone.

Be it further remembered that the jury then retired to deliberate upon their verdict, and that afterwards, on Sunday, the day following the day of their retirement, the jury was brought into the presence of the judge, by his order and upon his own motion, and, without request from the jury or any consent asked or given by the defendant, instructed the said jury as follows:

SPOKANE, WN., SUNDAY, 3 P. M., *Apr.* 23, '93.

The COURT: Gentlemen, have you agreed?

JURY: No.

A JUROR: If your honor please, I would like on behalf of the jury to ask the indulgence of the court for about an hour, or half an hour. We were about to ballot again when your honor came in, and I think, perhaps, if we were allowed to have another ballot that we would be able to agree.

The COURT: I hope that you will be able to agree upon a verdict, gentlemen. but I have decided to submit to you some questions to be answered by you in the nature of special findings, or a special verdict.

I have prepared these questions and would like to have
137 you answer them in addition to the general verdict as I instructed you before, for the plaintiff or for the defendant.

These questions I will read to you and then explain to you the manner in which you are to make your answer to them.

The first question is "Did the defendant Stone receive any saw-logs which had been unlawfully taken from any part of the lands specified in the complaint?"

You will answer that question "yes" or "no." I have had written the words "yes" and "no," and if you decide the question affirmatively draw a pen line through the word "no," and your answer will be yes. If you answer it negatively draw a pen line through the word "yes" and your answer will then be "no."

"Second. What sum does the jury award as damages on account of saw-logs?"

Then there follows the dollar-mark, and you will answer that question by putting in figures the amount that you decide to award

for saw-logs, in case you decide not to award any sum for saw-logs you will put in ciphers, following the dollar-mark.

"Third. Did the defendant Stone receive any ties which had been unlawfully taken from any part of the lands specified in the complaint?"

You will answer this "yes" or "no."

Then the questions as to the amount of railroad ties put in figures or ciphers to represent what amount you award for ties, and the same questions in regard to the cord-wood.

138 Of course, your answer to these questions and the amount of the ties, saw-logs and cord-wood will be in accordance with what I have instructed you about the measure of damages.

A JUROR: I would like to ask your honor if we are to decide these questions aside from our verdict, or whether this takes the place of our original verdict?

Mr. HYDE: It may seem a little unnecessary to make this remark, but I wish to state to the court that at another time, in another court, where special findings were submitted, we were met with a difficulty in some of the jury understanding the court that they must find the special questions—they must answer the questions which were submitted to them. I would like to have the court explain to the jury as to that matter.

The COURT: You may agree to what answer you will make to these questions, or else disagree. If you cannot come to an agreement about it, or the way to answer in any way as I have submitted them to you—it is submitted to you in the same way that the whole case was submitted to you, to be answered if you can.

Mr. WINSTON: If the court please, I would ask the court to explain to the jury as to the ties and saw-logs, that although the defendant Stone may have been personally an innocent purchaser, yet if they were unlawfully cut——

Mr. MCBRIDE: I shall certainly object to any such further instructions to the jury. The case has been submitted once for decision——

139 The COURT: I have instructed the jury specifically about all these subjects and I am not going to go over it again—the entire charge, and I don't feel inclined to pick out any specific parts of it and instruct the jury over again. The jury have not asked for any further instructions, and I presume that they understand what I have told them about it.

(To the jury:) This does not take the place of your general verdict, gentlemen. You will return a verdict for the plaintiff or for the defendant, and if for the plaintiff, you will specify the amount of your verdict for the entire amount. These are special questions which I have submitted to you for the use of the Government in other litigation, and I would like for this jury to decide about each one of these questions of amounts—about the saw-logs separate from the matter of the ties and cord-word, but I want you to return a verdict in the form I gave you yesterday in each one of the two cases, and in addition to the two verdicts which I directed you to return I would like to have you answer these questions if you can.

I hope you will be able to decide these matters, but of course there is no coercion about it. You are cautioned that it is very important that this jury should decide this case. The case has been fairly tried and well tried——

A JUROR: It appears to the jury that we have got an interested party on this jury somewhere.

The COURT: I cannot inquire into that matter at this time. I will leave the case with you and only express an anxiety that you will be able to agree. The case has been fully tried and I
140 feel that this jury is as well able to decide this case as another jury would be and I believe that you can as well come to an agreement as any other jury can.

A JUROR: I would like to ask are the jury allowed to sign a verdict on Sunday?

The COURT: Yes. And when you have come to an agreement send for me and I will receive your verdict.

That is all.

SPOKANE, WN., MONDAY, 10 A. M., *Apr.* 24.

Mr. MCBRIDE: I would like to have now, if the court please, an exception to the jury having been sent out on Sunday, and to the receiving of the verdict on Sunday. Of course, the instructions which your honor gave were given on your own motion, and not at the request of either party. I would like to have the benefit of such exception now, if the court please.

The COURT: I am willing to sign a bill of exceptions that recite the exact facts as they occurred, the fact of the giving of the instructions and special questions on Sunday.

The foregoing bill of exeeptions with the proposed amendments thereto, and the defendant's objections to said amendments were presented to me within the time allowed by rule of court. And now, upon due consideration thereof, the foregoing is hereby settled and allowed as the defendant's bill of exceptions and certified to be correct.

C. H. HANFORD, *Judge.*

June 23rd, 1893.

141 And afterwards, to wit: on the 17th day of October, 1893, there was duly filed in said court, in said cause, a petition for writ of error, the order of court allowing same and the assignment of errors in said cause, in the words and figures as follows, to wit:

In the United States District Court, District of Washington, Eastern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, Defendant.

(Consolidated with the case of the—

UNITED STATES OF AMERICA, Plaintiff,
vs.
JOHN H. STONE, EDWARD NOONAN, and W. G. KEGLER, Doing Business as the Spokane Fuel Company, Defendants.)

Petition for Writ of Error.

The above-named defendant, John H. Stone, considering himself aggrieved by the decision and judgment of this court, made and entered on the 2nd day of May, 1893, in the above-entitled action, doth attach hereto his assignment of errors as part hereof, and pray for a writ of error from said judgment to the United States circuit court of appeals for the ninth judicial circuit of the United States, and the said writ and citation issued thereon, and a transcript
142 of the record and proceedings herein, upon which said judgment was rendered, duly authenticated, may be sent to said court of appeals.

McBRIDE & ALLEN,
Defendant's Attorneys.

Order.

The foregoing petition having been presented this day, the assignment of errors annexed thereto, and it appearing that the petitioner is entitled to have the same allowed,

It is ordered that a writ of error be, and it is, hereby allowed, as prayed.

Dated October 17th, 1893.

JAS. H. BEATTY,
U. S. Dist. Judge, Presiding.

Assignment of Errors.

Upon the record and proceedings in this case, the plaintiff assigns the following errors:

First. The court erred in sustaining the demurrer of the plaintiff to the matter pleaded in the defendant's answer, setting up the defense of the former verdict upon the indictments found against defendant, in the United States district court of the district of Idaho, because the same was a good defense to this action and barred the same.

Second. The court erred in sustaining the demurrer to the answer of the defendant, Stone, in the action against the said defendant,

and his codefendants, Kegler and Noonan, in which the de-
143 fendant pleaded the defense of a former verdict upon indictments which were found, and upon which he was upon trial acquitted in the United States district court of the district of Idaho, because said matter presented a good defense to this action, and barred the same.

Third. The court erred in denying the challenge to the juror, John Giffin, on the trial of these actions, because the two cases of The United States *v.* John H. Stone, and The United States *v.* John H. Stone *et al.*, had been consolidated on plaintiff's motion, and such proceeding, if same should result in depriving parties defendant of the right to challenge, which they would enjoy if the cases were separately tried, was a denial of rights conferred by statute, and that in such trial as this, the party or parties defendant were entitled to three peremptory challenges in each case to be tried.

Fourth. The court erred in excluding the indictment, record and proceedings of the United States district court of the district of Idaho, in the case of The United States *v.* John H. Stone and the cases tried therewith, and in its refusal to permit the same to be read in evidence to the jury, because said record and proceedings as evidence were a bar to this action to the extent to which they applied, and were competent evidence to support the denials of the answer, as well as a bar to the plaintiff's right to recover.

Fifth. The court erred in excluding from the jury, as evidence, the appointment of the defendant, John H. Stone, as the agent of the Central Washington Railroad Company and of the Spokane & Palouse Railway Company, because said corporations having
144 been organized under the laws of the Territory of Washington, and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, and the proof shows that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads. The excluding of this proof was, therefore, error.

Sixth. The court erred in excluding said appointment of John H. Stone for the further reason that if said railroad ties were cut and taken by said Stone, defendant, in the honest belief that the cutting and taking were authorized by law, the measure of damages would be different from other unlawful taking; and if the jury found they were so cut and taken by mistake, the fact was proper for the jury to consider in estimating the damages. The excluding of this testimony, when offered for that purpose only, was erroneous.

Seventh. The court erred in permitting the attorney of the plaintiff to ask the questions of defendant Stone and other witnesses, as to whether the persons of whom he purchased timber were or were not now residing upon the land claimed by them at the time, because the same were incompetent, irrelevant and immaterial, and no part of the *res gestæ*.

Eighth. The court erred in allowing the plaintiff to introduce

the evidence tending to show that certain alleged settlers on
145 lands, of whom the defendant Stone purchased timber, had since abandoned said lands. Said evidence was objected to and admitted by the court, the same being immaterial, incompetent and irrelevant, and tended to induce the jury to believe that the acts of the said settlers, after they had sold the timber to the defendant were proper for their consideration.

Ninth. The court erred in refusing to give the following instruction at the request of the defendant: "In the case of The United States *v.* John H. Stone *et al.*, the defendant, John H. Stone, prays the court to instruct the jury as follows: There is no proof of the alleged partnership charged in the complaint; and the defendants are, therefore, entitled to a verdict."

Tenth. The court erred in refusing to give the following instruction at the request of the defendant: "When a pre-emption or homestead filing has been made by a settler duly qualified to make the same, the effect of such action, combined with an actual personal settlement on the public land so filed upon, is to sever such land so claimed from the mass of public lands and subject to the loss of the right of claimant by failure to comply with the subsequent conditions of the law, the settler becomes the owner of the land, and except as between him and the Government, he is entitled to exercise all the rights of owner."

Eleventh. The court erred in refusing to give the following instruction to the jury at the request of the defendant: "The legal presumption arising from the lawful entry made upon land by a claim under the law, as a homestead or pre-emption, and
146 occupation as such, is, that the claimants acted in good faith, and the burden of proving bad faith and attempting to defraud the Government is upon the plaintiff."

Twelfth. The court erred in refusing to give the following instruction to the jury, as requested by plaintiff: "If the jury find that the claimants of the land, who sold timber cut from the lands, to the defendant, Stone, were at the time residing upon it, having claimed it under the homestead and pre-emption laws, and were so improving their land as to indicate to the jury that they intended to acquire title by compliance with the law, and the sale of the timber was made under such circumstances as to lead the purchaser to believe that the parties selling it were acting in good faith, then such sale was lawful, and the plaintiff would not be entitled to recover anything for the timber so sold."

Thirteenth. The court erred in refusing to give to the jury the following instruction at the request of the defendant: "The fact that the claimants to land under the homestead and pre-emption laws, after occupation for a time abandoned the land, is not alone proof that they intend to defraud the Government, although in the meantime they had cut and sold timber from the land during their occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that the claimants of the land were acting in good faith at the time they sold the timber — the purchaser

had no reasonable grounds to believe otherwise, then such sale would be lawful."

147 Fourteenth. The court erred in its charge to the jury, wherein it stated: "I have decided that adjacent lands means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroads mentioned as the lands in Kootenai county, Idaho, where it is claimed these railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration, and relieves you from any consideration in regard to it because the act of Congress of March 3, 1875, under which the defendants sought to justify the cutting of the ties in question, contemplated and authorized the taking of ties under the circumstances and conditions established in this case. The timber cut was shown to be the nearest available timber to the localities where it was used, and because there being no rule fixed by the statute permitting timber and material to be used in construction as to the distance it may be so taken, it becomes necessarily a question to be determined by the circumstances, and is, therefore, a question depending on proofs, and consequently a question for the jury."

Fifteenth. The court erred in that part of its instructions to the jury in which it said: "As to all of the lands in which the title is in the United States, the timber and trees that are standing and growing thereon are part of the land, and the Government has title to those trees the same as in the soil," because it is not a correct exposition of the law, that the Government has title to the timber upon the land, because it has not parted with the legal title

148 to the soil; and said instruction, in connection in which it is expressed, tend- to injure the defendants before the jury.

Sixteenth. The court erred in that part of the instruction in which it said to the jury: "A settler who takes up a claim on public lands to perfect his right to it, until he has perfected his right, has no right to cut the timber except so far as is necessary and reasonable to prepare so much of the land for cultivation as he intends to cultivate. A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres, is only authorized to cut the timber off the few acres that he intends to cultivate. If he cuts down the timber, off forty acres, it would be in pursuance to a definite plan that the plow shall follow the axe, and that the entire forty acres shall be put to use for purpose of cultivation in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate, and intends to cultivate in good faith; but a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go out and cut that timber, by reason of his having filed on that land in the land office a declaration of his intention to take the land under

the pre-emption law, than if he goes and cuts it without filing any declaration. * * * He has no right to cut down and sell the timber on other portions of the land, which he is not intend-
149 ing to immediately put into cultivation," because the same is a restriction upon the rights of the settler, is a misconstruction of the law, and in violation of the privileges granted to the settler.

Seventeenth. The court erred in giving any instructions to the jury on Sunday, because he had no power to do any judicial act save to receive the verdict and discharge the jury, and all such instructions given by the court were without authority.

Eighteenth. The court erred in entering any judgment against the defendant upon the verdict, because the verdict was against law.

And afterwards, to wit: on the 17th day of October, 1893, there was issued in said cause a writ of error in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States in and for the district of Washington, eastern division, Greeting:

Because in the record and proceeding- and also in the rendition of the judgment of a plea which is in said district court, before you, between The United States of America, plaintiff, *vs.* John H. Stone, defendant (consolidated with the case of The United States of America, plaintiff, *vs.* John H. Stone, Edward Noonan, and W. G. Kegler, doing business as the Spokane Fuel Company, defendants), a manifest error hath happened, as by his com-
plaint appears, and it being fit that the error, if any there
150 hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the nine circuit, at San Francisco, California, together with this writ, so that you have the same at the said place within thirty days from the date hereof, in said court, to be there and then held, that, the record and proceedings aforesaid be- inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of October, in the year of our Lord one thousand and eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[SEAL.] R. M. HOPKINS, *Clerk*,
By —— ——, *Deputy Clerk.*

And afterwards, to wit: on the 17th day of October, 1893, there was issued in said cause a citation, in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear
151 before the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, State of California, within thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States, for the district of Washington, eastern division, wherein John H. Stone (consolidated with the case of United States of America *vs.* John H. Stone, Edward Noonan and W. G. Kegler, doing business as the Spokane Fuel Company) is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should — be done to the parties in that behalf.

Dated this 17th day of October, 1893.

JAS. H. BEATTY,
[SEAL.] *United States District Judge, Presiding in the said District Court.*

I admit service this 18th day of October, 1893.

W. H. BRINKER,
U. S. Attorney,
Per J. E. B.

And, to wit: on the 17th day of October, 1893, there was duly filed in said court, in said cause, the bond in said cause, duly approved by the judge presiding, in the words and figures as follows, to wit:

In the District Court of the United States, District of Washington, Eastern Division.

Appeal Bond.

Know all men by these presents, that we, John H. Stone
152 as principal, and George H. Leonard, and R. M. Russell as sureties, are held and firmly bound unto the United States of America, in the full and just sum of five hundred ($500) —, lawful money of the United States, for the payment of which well and truly to be made, we and each of us, hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 12th day of October, A. D. 1893.

The condition of the following obligation is such that: Whereas in the above-entitled court, in an action pending therein between The United States of America, plaintiff, and John H. Stone, defend-

ant, consolidated with the case of The United States of America, plaintiff, and John H. Stone, Edward Noonan and W. G. Kegler, doing business as the Spokane Fuel Company, defendants, judgment was, on the 28th day of April, 1893, rendered in favor of said plaintiff and against said *plaintiff*, for the sum of nineteen thousand dollars ($19,000) damages, and for one thousand, three hundred dollars, costs of suit, and,

Whereas, said John H. Stone has obtained from said court a writ of error to reverse the said judgment in said action, and citation directed to said plaintiff citing and admonishing it to appear in the said court, to be holden at San Francisco, in the State of California, on the — day of January next, has been issued:

Now, therefore, if the said defendant, John H. Stone, plaintiff in error, shall prosecute his said writ of error to effect, and shall
153 answer all damages and costs if he shall fail to make his plea good, then the above obligation shall be null and void, otherwise it shall be and remain in full force and effect.

JOHN H. STONE. [SEAL.]
GEORGE H. LEONARD. [SEAL.]
R. M. RUSSELL. [SEAL.]

Executed in the presence of—
Attest: JNO. R. McBRIDE.

STATE OF WASHINGTON, } ss:
County of Spokane, }

George H. Leonard and R. M. Russel, being first duly sworn, deposes, each for himself, as follows:

I am the person whose name is subscribed to the foregoing instrument as a surety thereon. I state that I reside at the county of Spokane, State of Washington; that I am a householder therein, and that I am worth the amount mentioned as the penalty in said bond over and above all my just debts and liabilities, and property which is not exempt from execution.

GEO. H. LEONARD.
R. M. RUSSELL.

Subscribed and sworn to before me this 12th day of October, 1893.

J. F. BROWN,
[SEAL.] *Notary Public for the State of Washington, Residing at Spokane, Washington.*

I approve of the sufficiency of the sureties to the within bond.

JAMES H. BEATTY,
U. S. District Judge, Presiding.

154 UNITED STATES OF AMERICA, } ss:
District of Washington, Eastern Division, }

I, R. M. Hopkins, clerk of the district court of the United States of America for the district of Washington, by virtue of the forego-

ing writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 167 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the causes No. 86 and 89, consolidated, of The United States of America, plaintiff, against John H. Stone, defendant, and The United States of America, plaintiff, against John H. Stone, Edward Noonan and W. G. Kegler, doing business as the Spokane Fuel Company, defendants, as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be affixed this the 30th day of October, A. D. 1893.

R. M. HOPKINS, *Clerk*,
[SEAL.] By JAMES O'NEILL,
Deputy Clerk.

155 United States Circuit Court of Appeals, Ninth Circuit.

JOHN H. STONE, Plaintiff in Error,
v.
THE UNITED STATES OF AMERICA, Defendants in Error. } Filed Oct. 2, 1894.

In error to the circuit court of the United States for the district of Washington.

This action was brought to recover the value of certain timber alleged to have been taken from the public lands of the United States and converted by the defendant (plaintiff in error) to his own use. There was pending at the same time a similar action, wherein The United States were plaintiffs and John H. Stone, Edward Noonan, and W. G. Kegler, doing business as the Spokane Fuel Co., were defendants, which was consolidated and tried with this action. Both cases were tried together before a jury and a verdict rendered in this action in favor of plaintiffs (defendants in error) for the sum of $19,000 and in the second action in favor of plaintiffs for $3,000. The verdict in the second action was, on defendants' motion, set aside. Only the first action, against Stone individually, is here for review upon its merits.

The complaint alleges the ownership of the lands from which the timber was taken and of the timber taken and converted to be in plaintiffs, its value, the unlawful taking and conversion by defendant, and prays for judgment for its value.

156 The answer consists of a general denial of all the allegations of the complaint except as to the quantity of timber alleged to have been sold to the Spokane Mill Company.

As affirmative defenses, the answer avers in substance (1) that between the months of August, 1888, and November, 1890, the defendant had certain contracts with his customers for the supply of railroad ties and timber for the manufacture of lumber at points along the line of the Northern Pacific railroad in the State of

Washington adjacent to the region mentioned in the complaint; that he procured timber for the purpose of filling these contracts from the lands embraced in the grant to aid in the construction of the Northern Pacific railroad, made by acts of Congress for that purpose, and by contract with that company, and that he had not at any time cut timber on any other land, except such as belonged to said railroad company; that he purchased timber and ties suitable for railroad uses from other persons, but, upon information and belief, alleges that all such ties and timber were either cut from railroad lands or were lawfully cut and sold to him by such other persons, and that no part thereof was cut or taken from lands of the United States; that the ties which he purchased were for the use of and were used in the construction of the Spokane & Palouse railroad and the Central Washington railroad, both corporations being organized and constructing their roads under and in compliance with grants made to them by the act of Congress of March 3, 1875; that such taking was not a trespass, but was by authority of law; (2) that in the month of April, 1891, at a term of the United States district court for the district of Idaho, the defendant was indicted for the commission of all the wrongs and trespasses for which this action was brought, under section 2461 of the Revised Statutes of the United States, as an offense against the penal laws of the United States; that he was arraigned upon said indictment and pleaded not guilty; that he was afterwards tried upon said
157 indictment, acquitted by the verdict of the jury, and discharged therefrom, and that said acquittal and discharge constitute a bar to this action. The plaintiffs replied to all of the averments in the answer except the second affirmative defense, and to this they demurred, upon the ground that the defense therein stated as a bar did not state facts sufficient to constitute a defense to the action. This demurrer was sustained. Upon the trial defendant offered to prove this defense by the production of the record of his acquittal and discharge. This evidence was refused.

There are eighteen specific assignments of error, which will be noticed under appropriate heads in the opinion.

John R. McBride, for plaintiff in error; Wm. H. Brinkner, U. S. attorney, for defendants in error.

Before McKenna and Gilbert, circuit judges, and Hawley, district judge.

HAWLEY, district judge (after stating the facts):

1. Did the court err in sustaining the demurrer to that part of defendant's answer which pleaded the indictment, trial, and verdict of acquittal in the Idaho court and in excluding the same when offered in evidence?

That the judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in an-

other court is too well settled to require discussion. It is also well settled that the plea of *res adjudicata*, except in certain special cases,
158 is not only conclusive upon the questions which the courts were required to form an opinion and pronounce judgment, but upon every point which properly belonged to the subject of litigation and which was or might properly have been brought forward in the former suit. One of the safest rules for courts to follow in determining whether a prior judgment between the same parties concerning the same matters is a bar is to ascertain whether the same evidence which is necessary to sustain the second action if it had been given in the former suit would have authorized a recovery therein. Under this test, is the judgment in the criminal case a bar to this action? What facts were required to be proven in order to sustain the respective actions?

The criminal case in Idaho was instituted and prosecuted by the United States against the defendant for an alleged wilful violation of a statute which, among other things, provided that "if any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live oak or red cedar trees, or other timber standing, growing, or being on any lands of the United States * * * shall pay a fine * * * and be imprisoned not exceeding twelve months." Rev. Stat. U. S., section 2461.

The indictment charged that defendant, at the time and place and upon the public lands therein mentioned, "did then and there unlawfully, wilfully, and feloniously cut and remove and cause and procure to be cut and removed from said lands fifty thousand timber trees then and there being and growing upon said lands," &c., &c.

This was an essential averment, which was necessary to be proven in order to convict the defendant.

The present action was brought to recover the value of the timber cut from the same lands. In order to sustain this action, it was only necessary, after establishing the title of plaintiffs to the
159 lands and the value of the timber taken therefrom, to prove that the defendant received and converted the timber to his own use. In other words, it was necessary in the criminal case to prove that the defendant, with knowledge that the lands belonged to the United States and with the intent and purpose to defraud the Government, either personally cut and removed the timber or with such knowledge and intent caused and procured the timber to be cut and removed, while to maintain this action it was only necessary to prove that the timber belonged to the Government and that the defendant came into possession of it and converted it to his own use without authority from the Government.

If in establishing these facts the evidence showed that the defendant was only an unintentional, not wilful, trespasser, or an innocent purchaser for value, or the purchaser from a trespasser without notice, the Government would, under the principles announced in Wooden Ware Co. *v.* The United States, 106 U. S., 432, be entitled

to recover. It will, therefore, readily be seen that if the same evidence which was necessary to sustain the present action had been given in the former suit it would not have authorized a conviction therein, and under the test which we have stated it would necessarily follow that the former judgment of acquittal is not a bar to the present action.

Is the test stated established by authority?

Freeman, in his work on Judgments, says: "The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. If this identity of evidence is found, it will make no difference that the form of the two actions is not the same. * * * Whatever be the form of action, the issue is deemed the same whenever it may, in both actions, be supported by sub-
160 stantially the same evidence. If so supported, a judgment in one action is conclusive upon the same issue in any other suit, though the cause of action is different. * * * On the other hand, if different proofs are required to sustain two actions, a judgment in one of them is no bar to the other. If the evidence in a second suit between the same parties is sufficient to entitle plaintiff to a recovery, his right cannot be defeated by showing any judgment against him in any action where the evidence in the present suit could not, if offered, have altered the result."

1 Freeman on Judg., sec 259.

This principle is recognized in Miller *v.* Manice, 6 Hill, 121, cited by defendant, and is fully sustained by numerous authorities.

Gayer *v.* Parker, 24 Neb., 643; Taylor *v.* Castle, 42 Cal., 371; Gilmer *v.* Morris, 30 Fed., 483; Riker *v.* Hooper, 35 Vt., 457; Ireland *v.* Emerson, 93 Ind., 2; Gordon *v.* State, 71 Ala., 315; Percy *v.* Foote, 36 Conn., 102.

But it is contended by defendant that the precise question involved in this case has been decided in his favor by the Supreme Court in Coffey *v.* United States, 116 U. S., 442. That opinion does not support the position taken by defendant and is not in any respect opposed to the conclusions we have reached. Coffey was a distiller of liquors, and a criminal information was filed against him for the violation of certain sections of the internal revenue laws; he was tried by a jury and acquitted. Afterwards a civil proceeding against the defendant to forfeit the property under the same section of the statute was instituted. The former judgment of acquittal was properly held to be a bar. Why? The decision of the court makes it perfectly plain, and, in our opinion, shows clearly and distinctly the difference between the facts of that case and this. In rendering the opinion the court said:

161 "The principal question is as to the effect of the indictment, trial, verdict, and judgment of acquittal set up in the * * * answer. The information is founded on sections 3257, 3450, and 3453, and there is no question on the averments in the answer that the fraudulent acts and attempts and intents to defraud

alleged in the prior criminal information and covered by the verdict and judgment of acquittal embraced all the acts, attempts, and intents averred in the information in this suit. The question, therefore, is distinctly presented whether such judgment of acquittal is a bar to this suit. We are of opinion that it is."

If the same things could be said in this case with reference to the criminal prosecution, then our conclusions would be the same as the court in that case. Again, further on in the opinion, it is said: "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all between the United States and the claimant in the criminal proceeding, so that the facts cannot be again litigated between them as the basis of any statutory punishment denounced as a consequence of the existence of the facts." That case came clearly within the rules and principles announced in the Duchess of Kingston case, which, as before stated, is the settled law everywhere recognized and followed.

We are of opinion that the rulings of the court under review were correct.

2. The next question relied upon for a reversal of this case is more technical than sound. The two cases were consolidated. The authority of the court to order them to be tried together is not denied. The right to do this when the cases involve substantially the same issues, and delay and expense would thereby be avoided, is unquestioned. Mutual Life Ins. Co. *v.* Hillman, 145 U. S., 293, and authorities there cited.

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No objection is urged on that account, but it is claimed that the court erred in refusing to allow the defendants in the other case to peremptorily challenge a juror, and that defendant is entitled to avail himself of that error in the present case.

The facts are that the defendant in this case had exercised three peremptory challenges, which was all that he was entitled to; "that thereupon the defendant, Stone and Noonan, peremptorily challenged John Giffin, one of the jurors, upon the ground that the defendants were entitled to challenge peremptorily in each of the cases on trial three jurors, and that they desired to exercise said challenge upon said juror in the said cause No. 89 on behalf of said defendants." Conceding that under the principles announced in Mutual Life Ins. Co. *v.* Hillman, *supra*, the two causes of action remained distinct and required separate verdicts and judgments, and that no defendant in either case could be deprived, without his consent, of any right material to his defense, whether by way of challenge of jurors or of objection to evidence, to which he would have been entitled if the two actions had been tried separately, it does not necessarily follow, as claimed by counsel, that the defendant in this case was prejudiced by the ruling of the court in the other cause. How could the defendant have been injured by such ruling? The two cases, although consolidated, were separate and distinct. Defendant had exercised all the rights and privileges he was entitled

to in this case. If the case had been tried by itself he could not have claimed but three peremptory challenges. He was not entitled to any more by reason of the consolidation. It is true that
163 the defendants in the other case were entitled to three additional peremptory challenges, and that if that privilege had been granted to them the result might have been that this defendant would have had the benefit of six challenges; but that result would follow by the circumstance of the consolidation and the fact that he was a party defendant in both actions instead of by virtue of any legal rights given to him by the law as a defendant in this action. He had exhausted his rights in this case, and he should not be permitted to complain because the court committed an error in the other case which did not deprive him of any substantial right under the law as a defendant in this action.

3. It is claimed that the court erred in excluding from the jury as evidence the appointment of defendant as the agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, (1) because said corporations, having been organized under the laws of the Territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, and the proof shows that the ties which are sued for were used by the said railroad companies in the construction of their roads; (2) for the further reason that if said railroad ties were cut and taken by defendant in the honest belief that the cutting and taking were authorized by law, the measure of damages would be different from other unlawful taking.

It appears from the record that the Spokane & Palouse railroad commenced at Marshall junction, on the line of the Northern Pacific railroad, and ran from that point in a southwest direction; that the Central Washington railroad commenced at Cheney, about eight miles west of Marshall junction, on the line of the Northern
164 Pacific, and ran therefrom in a northwesterly direction; that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region, almost entirely destitute of timber; that the timber was cut from lands along the line of the Northern Pacific about fifty miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found.

The question whether the court erred in excluding the testimony is to be determined by an interpretation of the act of March 3, 1875, which grants to railroads companies the right of way through the public lands of the United States; "also the right to take from the public lands adjacent to the line of said road material—earth, stone, and timber—necessary for the construction of said railroad." 18 U. S. Stat., 482.

If the timber taken was not "adjacent to the line" of the railroads in question, then the fact whether defendant was the agent

of the railroad companies was wholly immaterial and irrelevant. Upon this subject the court charged the jury as follows: "The act of Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient or within a convenient distance to the building and construction of a new railroad that the railroad company has a right to require the United States to provide them with material or go upon distant lands and procure the material that they require; that is not the scope of the law, and so I have decided that adjacent lands means lands in proximity, contiguous to or near to the road, and that lands so far distant from the railroad and mentioned as the lands in Kootenai county, Idaho, where it is claimed that railroad
165 ties were cut, were not adjacent lands within the meaning of the law." Some differences of opinion have been expressed by the courts as to the true purpose, intent, and object and proper construction of this act. Judge Hallet, in U. S. *v.* Denver & R. G. R'y Co., 31 Fed., 886, held that the language of the act was intended to indicate such timber and other material as could be conveniently reached by ordinary transportation by wagons. Judge Deady, in U. S. *v.* Chapin, 31 Fed., 890, declared that land is adjacent to the line of the road, within the purpose and intent of the act, when by reason of its proximity thereto it is directly and materially benefitted by the construction of the railroad, while Judge Knowles, in U. S. *v.* Lynde, 47 Fed., 300, expressed the opinion that it was left in doubt as to what should be considered adjacent land to the line of the road, and came to the conclusion "that it must be determined by the evidence in the case."

In Denver & Rio Grande R. Co. *v.* U. S., 34 Fed., 841, certain views were expressed upon this subject directly applicable to the facts of this case which we consider sound and just. It was there stipulated that the lands from which the timber was cut were adjacent to the line of railway, and Judge Brewer for this reason said: "I shall not stop to consider how near land must be to be adjacent—whether half a mile or ten miles." But he immediately added his individual views as follows: "I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient (which is the direct contention of defendant in this case). The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that if there be no timber on adjacent lands the grant reaches out and justifies the taking of timber from distant lands—lands fifty or a hun-
166 dred miles away." The case was taken to the Supreme Court of the United States and there affirmed—U. S. *v.* Denver and Rio Grande R. Co., 150 U. S., 1—but under the stipulation this question was not there passed upon. We are of opinion that under the facts presented in this case it could not fairly be said, under any reasonable construction of the language of the act, that the timber was taken from lands "adjacent to the line" of either

of the roads in the construction of which it was used; that the court did not err in excluding the evidence of defendant's agency, and that the charge of the court withdrawing this question from the jury was not erroneous.

4. To further sustain his defense the defendant relied upon the fact that he had bought a portion of the timber from certain parties who had settled upon the public lands and filed their declaration as settlers in the land office. It is contended that the court erred in permitting the attorney for plaintiffs to cross-examine the defendant and other witnesses as to whether some or all of the claimants to these lands had continued to reside upon the lands since the timber was cut; that the court erred in giving certain instructions to the jury relative to the rights of such claimants and in refusing to give instructions which were asked by the defendant, to the effect that (10) when a pre emption or homestead filing has been made by a settler the effect of such action, combined with an actual settlement on the public land, is to sever the land from the public domain and, subject only to the laws of the claimant of his rights by failure to comply with the subsequent conditions of the land, the settler becomes the owner of the land, and, except as between him and the Government, he is entitled to exercise all the rights of the owner; (11) that the legal presumption arising from the
167 lawful entry made upon land by a claim under the law as a homestead or pre-emption and occupation as such is that the claimants acted in good faith, and the burden of proving bad faith and attempting to defraud the Government is upon the plaintiff; (12) that if the jury should find that the claimants of the land who sold timber cut from the lands to defendant were at the time residing upon it, having claimed it under the homestead and pre-emption laws, and were so improving their land as to indicate to the jury that they intended to acquire title by compliance with the law, and that the sale of the timber was made under such circumstances as to lead the purchaser to believe that the parties selling it were acting in good faith, then such sale was lawful and the plaintiff would not be entitled to recover anything for the timber so sold.

The court, after clearly and correctly stating the issues which were involved in the suit and announcing the principles of law which govern the right of property in public lands and the manner in which settlers upon the public lands could acquire title thereto and their rights in the premises, to which no exceptions were taken, charged the jury as follows:

"A settler who takes up a claim on public lands, intending to perfect his right to it, until he has perfected his right has no right to cut the timber, except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate. A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres it should be in pursuance to a definite plan that the plow shall follow

the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes
168 use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim—a claim covered with timber—should remain as a preserve—a timber preserve—for the future benefit of the land and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith; but a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the pre-emption law than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law by making a home upon the land—actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law—he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation."

This portion of the charge must be considered in the light of the fact that the court had, at great length, correctly charged the jury as to the rights of *bona fide* settlers upon the public lands, and that, under the peculiar facts of this case, it became the duty of the court to charge the jury as to the limitations and exceptions to certain general rules he had enunciated and to submit to the jury the question whether the persons from whom defendant had purchased the timber were actual settlers in good faith and whether they had, under the pre-emption or homestead laws, acquired any right to the lands.

The testimony was to the effect that the settlements had
169 been made upon lands that were not well adapted for cultivation; that the improvements which had been made were very slight, consisting only of small cabins; that there was no such clearing of the land as to indicate that the timber had been cut and removed for the purpose of cultivating the soil; that the cutting of the timber had been done indiscriminately all over the claim; that the limbs and brush and tops of the trees had been left upon the ground; that the parties who had filed their declarations of settlement, after cutting and selling the timber off the land, had departed therefrom, &c., &c. It is conceded by the defendant that all the testimony which tended to establish fraud and bad faith of these settlers was admissible in evidence. It would have been error to exclude any testimony which tended to establish such facts.

U. S. *v.* Steenerson, 50 Fed., 504, and authorities there cited.

The charge of the court under consideration was applicable to the facts of the case and, in our opinion, correctly stated the principles of law that applied to such facts.

U. S. *v.* Cook, 19 Wall., 591; U. S. *v.* Williams, 18 Fed., 475; U. S. *v.* Ball, 31 Fed., 668.

The instruction (10) drawn by defendant was erroneous in this, that it proceeded upon the assumption that the settler acquires title and "all the rights of ownership" by the mere fact of the filing of his declaration and making settlement. This is not the law.

U. S. *v.* Ball, *supra;* Schofield *v.* Houle, 22 Pac., 781; Thrift *v.* Delaney, 65 Cal., 193, and authorities there cited.

The court did not err in refusing to give the instruction asked by defendant, that "the burden of proving bad faith and attempting to defraud the Government is upon the plaintiffs." This was not an issue raised or presented by the plaintiffs as part of their case.

170 The issue as to the good faith of the settlers from whom the defendant bought timber was presented by the defendant as a defense. The court correctly charged the jury that "the party who alleges the fact and undertakes to establish the case by reason of certain facts which he says exists has resting upon him the burden of proof, and he is required to establish what he alleges by evidence sufficient to outweigh all the evidence to the contrary, and unless there is a fair preponderance in his favor the jury should render a verdict against him."

The other instruction (12) asked by defendant was calculated to mislead the jurors in this, that it withdrew from their consideration the facts that the claimants of the land from whom defendant bought timber abandoned the land after cutting the timber and left the question of their good faith upon the fact of their actual residence at the time the timber was cut; but it is a complete answer to this as well as the last instruction to say that the charge of the court, to which no specific objection was taken, covered all the material questions involved in these instructions. The court, among other things, charged the jury that, "As between the Government and the settler the title to the land until the conditions of the law are fulfilled remains in the United States, but in the meantime if the settler is engaged in improving the land as required by law and disposes of any surplus timber without intent to defraud the Government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the Government, the sale is lawful and the purchaser is protected. The fact that claimants to lands under the homestead and pre-emption laws after occupation for a time abandon the lands is not alone proof that they intend to defraud the Government, although in the meantime they have cut and sold the timber from the lands during the occu-

171 pation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that the claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable grounds to believe otherwise, then such sale would be lawful."

5. We decline to review any assignment of error based upon any portion of the charge or instructions of the court wherein the record

fails to show affirmatively that timely exceptions were taken thereto "while the jury was at the bar."

Phelps *v.* Mayer, 15 How., 160; U. S. *v.* Breitling, 20 How., 252; French *v.* Edwards, 13 Wall., 506; Stanton *v.* Embrey, 93 U. S., 548; U. S. *v.* Carey, 110 U. S., 51; Hunnicutt *v.* Peyton, 122 U. S., 333.

6. It is claimed that "the court erred in giving any instructions to the jury on Sunday." It is doubtful if this alleged error is presented in such a manner as to require this court to pass upon it. The record shows that the jury retired on Saturday to deliberate upon their verdict; that on the following day, Sunday, the jury was brought into court upon the court's own motion, counsel for both parties being present, and asked if they had agreed upon a verdict; that the reply was in the negative; that the judge remarked that he hoped the jury would be able to agree, and stated that he desired the jury to answer some questions in the nature of special findings. These questions were: (1) "Did the defendant Stone receive any saw-logs which had been unlawfully taken from any part of the lands specified in the complaint?" (2) "What sum does the jury award as damages on account of saw-logs?" (3) "Did the defendant Stone receive any ties which had been unlawfully taken from any part of the lands specified in the complaint?"

The court informed the jury that the answer to these ques-
172 tions should be given in accordance with previous instructions about the measure of damages, and that the questions were submitted "in the same way that the whole case was submitted to you, to be answered if you can." Thereupon the attorney for the United States requested the court to explain to the jury certain matters as to the ties and saw-logs, which the court declined to do, but stated that the jury had been specifically instructed upon these subjects, and he declined to instruct them further and said that he desired an answer to the special questions "for the use of the Government in other litigation." The jury retired and thereafter, on the same day, came into court and rendered a general verdict against the defendant, and also answered the special questions submitted by the court, and were then discharged On Monday, at the opening of court, counsel for defendant stated that he would like to have an exception entered "to the jury having been sent out on Sunday and to the receiving of the verdict on Sunday." The court stated that a bill of exceptions would be signed which recites "the exact facts as they occurred." From this statement it appears that no exceptions were taken on Sunday to any of the transactions that occurred on that day.

It is questionable if the proceedings which took place could be fairly classed as instructions to the jury, but if they could be so considered and the court had any power to give instructions on Sunday, it was the duty of the defendant to have then and there excepted if he had any objections thereto. It is evident that the defendant was not prejudiced by anything that transpired in court on that day. All that was said had reference to the finding of a special

verdict, which could not have affected the result as to the general verdict. The remark of the court that the answers were required for use in other cases might very properly have been omitted,
173 but we are unable to see how it could have had any tendency to influence the jury against the defendant. The whole case was fairly and impartially submitted by the court in its general charge given to the jury on the day before, and the court on Sunday declined to give any further instructions and informed the jury that the answers to the special questions should be given in accordance with the previous instructions. It was left optional with the jury to answer these questions, although the court requested them to do so if they could.

There is no statute in the State of Washington, as in most of the other States, which authorizes the courts to receive a verdict on Sunday, and it is for this reason claimed that all the proceedings on Sunday were void. It is true that by the common law Sunday is *dies non juridicus*, and that all judicial proceedings which take place on that day are void. It is certain that under the rules of the common law no trial could be had or judgment rendered on Sunday. White *v.* Pergue, 15 Nev., 146; Pearce *v.* Atwood, 13 Mass., 347; Chapman *v.* State, 5 Blackf., 111; Freeman on Judg., section 138, and authorities there cited.

But no trial was had nor any judgment rendered in this case on Sunday.

Did the court have any authority to receive the verdict on Sunday? We are of opinion that this question must be answered in the affirmative, whether it is authorized by statute or not, upon the authority of Ball *v.* United States, 140 U. S., 131. In that case the Supreme Court said: "On Sunday, the third of November, the record shows the return of the verdict finding 'the defendants J. C. Ball & R. E. Boutwell guilty as charged in this indictment, and we find M. Filmore Ball not guilty,' which is followed by these words:
'It is therefore considered by the court that the defendants
174 J. C. Ball and R. E. Boutwell are guilty as charged in the indictment herein and as found by the jury, and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar county to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged, and go hence without day.'

If this could be regarded as the judgment of the court, it was void because entered on Sunday.

Mackalley's case, 5 Coke, 111; Swann *v.* Broome, 3 Burrow, 1595; Baxter *v.* People, 3 Gilm. (8 Ills.), 368; Chapman *v.* State, 5 Blackford, 111. But it is clear that it cannot be treated as a judgment, and is in effect nothing more than a remand for sentence."

The judgment of the circuit court is affirmed with costs.

(Endorsed:) Filed Oct. 2, 1894. F. D. Monckton, clerk.

175 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1893.

JOHN H. STONE, Plaintiff in Error,
v.
THE UNITED STATES. } No. 153.

In error to the district court of the United States for the district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed, and the cause is remanded to said district court for such execution and further proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) Judgment. Filed Oct. 2, 1894. F. D. Monckton, clerk.

176 In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

JOHN H. STONE, Plaintiff in Error,
(Consolidated with the Case of The United States of America, Plaintiff, *vs.* John H. Stone, Edward Noonan, and W. G. Kegler, Doing Business as the Spokane Fuel Company, Defendants),
vs.
UNITED STATES OF AMERICA, Defendant in Error. } Petition for Writ of Error.

To the Honorable Stephen J. Field, associate justice United States Supreme Court:

The above-named plaintiff in error, John H. Stone, considering himself aggrieved by the decision and judgment of this court, made and entered on the 2nd day of October, 1894, in the above-entitled action, doth attach hereto his assignment of errors as part hereof and pray for a writ of error from said judgment to the United States Supreme Court, and that the said writ and citation issued thereon and a transcript of the record and proceedings herein, upon which said judgment was rendered, duly authenticated, may be sent to said Supreme Court.

Dated ——, 1895.

JNO. R. McBRIDE,
Attorney for Plaintiff in Error.

177 *Assignment of Errors.*

Upon the record and proceedings in this case the plaintiff assigns the following errors:

First. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in sustaining the demurrer of the defendant in error to the matter pleaded in the answer of plaintiff in error setting up the defense of the former verdict upon the indictments found against defendant in the United States district court of the district of Idaho, because the same was a good defense to this action and barred the same.

Second. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in sustaining the demurrer to the answer of the plaintiff in error Stone in the action against the said plaintiff in error, in which the plaintiff in error pleaded the defense of a former verdict upon indictments which were found and upon which he was upon trial acquitted in the United States district court of the district of Idaho, because said matter presented a good defense to this action and barred the same.

Third. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that
178 court from the district court of the district of Washington, to wit:

The court erred in denying the challenge to the juror John Giffin on the trial of these actions because the two cases of The United States *v.* John H. Stone and The United States *v.* John H. Stone *et al.* had been consolidated on motion of the defendant in error, and such proceeding, if same should result in depriving parties defendant of the right to challenge which they would enjoy if the cases were separately tried, was a denial of rights conferred by statute, and that in such trial as this the party or parties defendant were entitled to three peremptory challenges in each case to be tried.

Fourth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in excluding the indictment, record, and proceedings of the United States district court of the district of Idaho in the case of the United States *v.* John H. Stone and the cases tried therewith, and in its refusal to permit the same to be read in evidence to the jury, because said record and proceedings as evidence were a bar to this action to the extent to which they applied and were competent evidence to support the denials of the answer, as well as a bar to the right of defendant in error to recover.

Fifth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

179 The court erred in excluding from the jury as evidence the appointment of the plaintiff in error, John H. Stone, as the agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, because said corporations, having been organized under the laws of the Territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, and the proof shows that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads. The excluding of this proof was, therefore, error.

Sixth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in excluding said appointment of John H. Stone for the further reason that if said railroad ties were cut and taken by said Stone, plaintiff in error, in the honest belief that the cutting and taking were authorized by law, the measure of damages would be different from other unlawful taking; and, if the jury found they were so cut and taken by mistake, the fact was proper for the jury to consider in estimating the damages. The excluding of this testimony, when offered for that purpose only, was erroneous.

180 Seventh. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in permitting the attorney of the defendant in error to ask the question of plaintiff in error Stone and other witnesses as to whether the persons of whom he purchased timber were or were not now residing upon the land claimed by them at the time, because the same were incompetent, irrelevant and immaterial, and no part of the *res gestæ*.

Eighth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in allowing the defendant in error to introduce the evidence tending to show that certain alleged settlers on lands of whom the plaintiff in error Stone purchased timber had since abandoned said lands. Said evidence was objected to and admitted by the court, the same being immaterial, incompetent, and irrelevant, and tended to induce the jury to believe that the acts of the said settlers after they had sold the timber to the plaintiff in error were proper for their consideration.

Ninth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in refusing to give the following instruction at the request of the defendant: "In the case of The United States *v.*

John H. Stone *et al.* the defendant John H. Stone prays the court to instruct the jury as follows: There is no proof of the
181 alleged partnership charged in the complaint, and the defendants are therefore entitled to a verdict."

Tenth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in refusing to give the following instruction at the request of the defendant: "When a pre-emption or homestead filing has been made by a settler duly qualified to make the same, the effect of such action, combined with an actual personal settlement on the public land so filed upon, is to sever such land so claimed from the mass of public lands and, subject to the loss of the right of claimant by failure to comply with the subsequent conditions of the law, the settler becomes the owner of the land, and except as between him and the Government, he is entitled to exercise all the rights of owner."

Eleventh. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in refusing to give the following instruction to the jury at the request of the defendant: "The legal presumption arising from the lawful entry made upon land by a claim under the law as a homestead or pre-emption and occupation as such is that the claimants acted in good faith, and the burden of proving bad faith and attempting to defraud the Government is upon the plaintiff."

Twelfth. The circuit court of appeals erred in sustaining
182 the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in refusing to give the following instruction to the jury, as requested by plaintiff: "If the jury find that the claimants of the land, who sold timber cut from the lands to the defendant Stone, were at the time residing upon it, having claimed it under the homestead and pre-emption laws, and were so improving their land as to indicate to the jury that they intended to acquire title by compliance with the law, and the sale of the timber was made under such circumstances as to lead the purchaser to believe that the parties selling it were acting in good faith, then such sale was lawful and the plaintiff would not be entitled to recover anything for the timber so sold."

Thirteenth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in refusing to give to the jury the following instruction at the request of the defendant: "The fact that the claimants to land under the homestead and pre-emption laws after occupation for a time abandoned the land is not alone proof that they intend to defraud the Government, although in the meantime they had cut and sold timber from the land during their occupation,

but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that the claimants of the land were
183 acting in good faith at the time they sold the timber — the purchaser had no reasonable grounds to believe otherwise, then such sale would be lawful."

Fourteenth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in its charge to the jury wherein it stated: "I have decided that adjacent lands means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroads mentioned as the lands in Kootenai county, Idaho, where it is claimed these railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration and relieves you from any consideration in regard to it, because the act of Congress of March 3, 1875, under which the defendants sought to justify the cutting of the ties in question, contemplated and authorized the taking of ties under the circumstances and conditions established in this case, the timber cut was shown to be the nearest available timber to the localities where it was used, and because there being no rule fixed by the statute permitting timber and material to be used in construction as to the distance it may be so taken, it becomes necessarily a question to be determined by the circumstances, and is therefore a question depending on proofs, and consequently a question for the jury."

Fifteenth. The circuit court of appeals erred in sustaining
184 the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in that part of its instructions to the jury in which it said: "As to all of the lands in which the title is in the United States, the timber and trees that are standing and growing thereon are part of the land, and the Government has title to those trees the same as in the soil," because it is not a correct exposition of the law, that the Government has title to the timber upon the land because it has not parted with the legal title to the soil, and said instruction, in connection in which it is expressed, tend to injure the defendants before the jury."

Sixteenth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in that part of the instruction in which it said to the jury: "A settler who takes up a claim on public lands to perfect his right to it, until he has perfected his right has no right to cut the timber except so far as is necessary and reasonable to prepare so much of the land for cultivation as he intends to cultivate. A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate. If

he cuts down the timber off forty acres, it would be in pursuance to a definite plan that the plow shall follow the axe, and that the entire forty acres shall be put to use for purpose of cultiva-
185 tion in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith; but a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go out and cut that timber by reason of his having filed on that land in the land office a declaration of his intention to take the land under the pre-emption law than if he goes and cuts it without filing any declaration. * * * He has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put in cultivation," because the same is a restriction upon the rights of the settler, is a misconstruction of the law, and in violation of the privileges granted to the settler.

Seventeenth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in giving any instructions to the jury on Sunday, because he had no power to do any judicial act save to receive the verdict and discharge the jury, and all such instructions given by the court were without authority.

Eighteenth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:
186 The court erred in entering any judgment against the defendant upon the verdict, because the verdict was against law.

Nineteenth. The circuit court of appeals erred in affirming the judgment, because the same is against law.

JNO. R. McBRIDE,
Att'y for Pl'ff in Error.

Order.

The foregoing petition having been presented this day, the assignment of errors annexed thereto, and it appearing that the petitioner is entitled to have the same allowed—

It is ordered that a writ of error be, and it is hereby, allowed as prayed.

Dated March 11th, '95.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court U. S.

(Endorsed:) Petition for writ of error and order thereon. Filed March 29, 1895. F. D. Monckton, clerk.

187 *Appeal Bond.*

Know all men by these presents that we, John H. Stone, as principal, and George H. Leonard and R. M. Russell, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred dollars ($500), lawful money of the United States; for the payment of which, well and truly to be made, we and each of us hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-sixth day of December, A. D. 1894.

The condition of the following obligation is such that whereas in the above-entitled court in an action pending therein between John H. Stone, plaintiff in error, consolidated with the case of The United States of America, plaintiff, *vs.* John H. Stone, Edward Noonan, and W. G. Kegler, doing business as the Spokane Fuel Company, defendants, *vs.* United States of America, defendant in error, judgment was, on the 22nd day of October, 1894, affirmed in favor of said defendant in error and against said plaintiff in error for the sum of nineteen thousand dollars ($19,000), damages, and for — dollars, interest, costs of suit; and

Whereas said John H. Stone has obtained from said court a writ of error to reverse the said judgment in said action, and citation, directed to said defendant in error, citing and admonishing it to appear in the said court, to be holden at Washington city, District
188 of Columbia, on the — day of October, 1895, has been issued:

Now, therefore, if the said plaintiff in error, John H. Stone, shall prosecute his said writ of error to effect, and shall answer all damages and costs if he shall fail to make his plea good, then the above obligation shall be null and void; otherwise it shall be and remain in full force and effect.

JOHN H. STONE.
GEORGE H. LEONARD.
R. M. RUSSELL.

Executed in the presence of—
Attest: JOHN R. McBRIDE.

STATE OF WASHINGTON, } *ss:*
County of Spokane, }

George H. Leonard and R. M. Russell, being first duly sworn, deposes, each for himself, as follows:

I am the person whose name is subscribed to the foregoing instrument as a surety thereon. I state that I reside at the county of Spokane, State of Washington; that I am a householder therein, and that I am worth the amount mentioned as the penalty in said bond over and above all my just debts and liabilities and property which is not exempt from execution.

GEO. H. LEONARD.
R. M. RUSSELL.

Subscribed and sworn to before me this 26th day of Dec., 1894.

[SEAL.] P. F. QUINN,
Notary Public.

Approved:
STEPHEN J. FIELD,
Associate Justice Supreme Court U. S.

(Endorsed:) Bond on writ of error. Filed March 29, 1895. F. D. Monckton, clerk.

189 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN H. STONE, Plaintiff in Error,
vs.
THE UNITED STATES. } No. 153.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and eighty-eight pages to be a full, true, and correct copy of the printed record and of all proceedings in the above-entitled cause in our said circuit court of appeals, and that the same together constitute the return to the annexed writ of error.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 4th day of April, A. D. 1895.

F. D. MONCKTON, *Clerk.*

190 Original.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between John H. Stone, plaintiff in error, and The United States, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid

being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 11th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

191 [Endorsed:] Dock. No. 153. John H. Stone, pl'ff in error, *v.* The United States. Writ of error. Filed March 29, 1895. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

192 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein John H. Stone is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

193 [Endorsed:] Dock. 153. John H. Stone, pl'ff in error, *v.* The United States. Citation. Filed April 2, 1895. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

Service of the within citation by delivery of copy is hereby acknowledged this 28th day of March, 1895.

WM. H. BRINKER,
U. S. Att'y.

Endorsed on cover: Case No. 15,879. U. S. circuit court of appeals, ninth circuit. Term No., 265. John H. Stone, plaintiff in error, *vs.* The United States. Filed April 22d, 1895.

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167-178

Court, U. S.
FEB 6 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 265.

JOHN H. STONE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF JOHN R. McBRIDE FOR PLAINTIFF IN ERROR.

J. R. LAMBLY, PRINTER, SPOKANE, WASH.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 265.

JOHN H. STONE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

In the years 1888, 1889 and 1890, John H. Stone, the defendant in the action and the plaintiff in error here, was engaged in the business of cutting timber for railroad ties, to supply the needs of the Northern Pacific railroad company, in Idaho and Eastern Washington. He, also, in connection with supplying the railroad company with ties for its purposes, purchased timber for saw-logs which he disposed of to

the public. The region of this cutting and purchase was in the forests of the western slope of the Cœur d'Alene mountains, in the Territory of Idaho, where the land grant to the Northern Pacific Railroad Company was of the width of 20 miles on each side of the line of the railroad and consisted of the odd sections granted to the company by the United States.

By a contract with the company, Stone was authorized to take any timber from all sections belonging to it; for such timber as he supplied to the company, he paid nothing, but for all saw-logs sold by him to other parties he paid the railroad company a fixed price, and he delivered the timber cut for the company at switches or side-tracks provided on the line of the railroad, in the Territory of Idaho. And the logs which were sold to other purchasers than the railroad company, were likewise delivered at the same points on the railroad.

The Northern Pacific Company was at the time engaged in constructing two branches of the main line, viz.: the Central Washington Railroad, running from a point about sixteen miles west of the city of Spokane, Territory of Washington, and some fifty miles west of where the timber, alleged to have been unlawfully cut by Stone, was delivered to the railroad. The road ran northerly from its junction with the Northern Pacific Railroad, a distance of some sixty miles, to its terminus. The Spokane and Palouse

Railway line was a branch road which ran south from its junction with the main line of the Northern Pacific, at Marshall, eight miles west of Spokane, a distance of one hundred miles, and terminated at Julietta, Idaho. Each of the roads was incorporated under the Act of Congress granting rights of way to railway companies to construct roads over the public land, and was entitled to all the privileges granted by that Act. Their articles of incorporation were duly filed and approved by the Secretary of the Interior, and they were entitled to all the benefits conferred by the Act of Congress of March, 1875.

The ties for each of these roads, used in construction, were the ties furnished to the Northern Pacific Railroad by Stone in Idaho, were carried over its main line to the point where the branch roads left that line and were distributed as the new lines were constructed along the course of those roads. The ties used for the construction of these lines were in part taken from the sections reserved to the United States, while the greater proportion were cut from those sections which had been granted to the company. The region to which they were transported and used was destitute of timber, and the region from which they were taken was the nearest district of country on which timber for ties could be found.

The reserve sections of land in the same region were largely settled upon as homesteads and pre-emp-

tions by citizens; and the proof in this case showed that, from persons who had thus settled upon and were occupying these lands, the defendant Stone had purchased logs for lumber purposes and sold them, besides the timber which by contract he had cut from the lands of the railroad company. In April, 1890, the timber agents of the U. S. land department having learned that Stone had been buying logs from these settlers and pre-emptors, and had cut ties and delivered them to the railroad company from certain of the reserve sections, caused him to be indicted, under section 2461 of the U. S. Revised Statutes, by the U. S. Grand Jury for the District of Idaho. In some cases he was indicted alone, and in others he was indicted with the settlers from whom he bought the timber.

These indictments covered the precise charges for cutting timber unlawfully which are included in this civil action for damages. The defendant Stone was duly arraigned in the U. S. District Court for the District of Idaho; after his plea of not guilty, the cases called, to save expense, were consolidated and tried together. After a trial lasting many days, and a prosecution which was not only vigorous but extremely rigorous, the defendant was acquitted.

Some six months after the criminal proceedings, the United States, by its District Attorney for the District of Washington, filed the complaints in these cases in the District Court of the United States for

the Eastern Division of the District of Washington, and sought to recover the value of the timber for the cutting of which the defendant had been before indicted, tried and acquitted in the Federal Court of Idaho.

To the complaint so filed the defendant Stone, then and always a citizen of the State of Washington, pleaded in bar the judgment of acquittal previously rendered on the indictments against him in the District of Idaho —to which a demurrer was filed by the United States. The demurrer was sustained, exception was taken to the ruling, and this ruling is here assigned for error. The defendant then filed his answer to the suits in the two cases, one The United States *vs.* John H. Stone, the other The United States *vs.* John H. Stone, et al., and the cases by order of the court being consolidated for trial, they were tried before the court and a jury, and under the instructions verdicts were found for the plaintiff. In the case of The United States *vs.* Stone, et al., the verdict was vacated. In the other case, judgment was entered on the verdict.

To the judgment in this action a writ of error was sued out from the U. S. Circuit Court of Appeals for the Ninth Circuit and, upon the hearing in that court, the judgment of the District Court of the District of Washington, was affirmed—and to that judgment of affirmance the defendant brings this writ of error—and prays for its reversal.

We assert this record contains numerous errors prejudicial to the plaintiff in error and make the following

ASSIGNMENT OF ERRORS:

First. The District Court of the United States for the District of Washington was without any jurisdiction of the action, for the reason that the trespass complained of on the face of the pleadings occurred in the Territory of Idaho, on public lands situated and lying in Idaho, over which trespass the court for that District only had jurisdiction.

Second. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court:

"The court erred in sustaining the demurrer of the defendant in error to the matter pleaded in the answer of plaintiff in error setting up the defense of the former verdict upon the indictments found against the defendant in the United States District Court of the District of Idaho, because the same was a good defense to this action and barred the same."

Third. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington, to-wit:

"The court erred in sustaining the demurrer to the answer of the plaintiff in error Stone in the action

against the said plaintiff in error, in which the plaintiff in error pleaded the defense of a former verdict upon the indictments which were found, and upon which he was upon trial acquitted in the United States District Court of the District of Idaho; because said matter presented a good defense to this action and barred the same."

Fourth. The Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in denying the challenge to the juror John Giffin on the trial of these actions because the two cases of The United States *vs.* John H. Stone, and The United States *vs.* John H. Stone, et al., had been consolidated on motion of the defendant in error, and such proceedings, if same should result in depriving parties defendant of the right of challenge which they would enjoy if the cases were separately tried, was a denial of a right conferred by statute, and that in such trial as this the party or parties defendant were entitled to three peremptory challenges in each case to be tried."

Fifth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in excluding the indictment, record, and proceedings of the United States District

Court of the District of Idaho, in the case of United States *vs.* John H. Stone, and the cases tried therewith and its refusal to permit the same to be read in evidence to the jury—because said record and proceedings as evidence were a bar to this action, and were competent to support the denials of the answer, as well as a bar to the right of the defendant in error to recover."

Sixth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in excluding from the jury, as evidence, the appointment of the plaintiff in error, John H. Stone, as agent of the Central Washington Railroad Company, and of the Spokane and Palouse Railway Company, because said corporations, having been organized under the laws of the Territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, and the proof shows that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads. The excluding of this proof was, therefore, error."

Seventh. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following

assignment of error to that court from the District Court of the District of Washington:

"The court erred in excluding said appointment of John A. Stone for the further reason that if said railroad ties were cut and taken by said Stone, plaintiff in error, in the honest belief that the cutting and taking were authorized by law, the measure of damages would be different from other unlawful and wilful taking; and if the jury found they were so cut and taken by mistake, the fact was proper for the jury to consider in estimating the damages. The exclusion of the testimony, when offered for that purpose only, was erroneous."

Eighth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in permitting the attorney of the defendant in error to ask the question of plaintiff in error, Stone, and other witnesses, as to whether the persons of whom he purchased timber were or were not now residing upon the land claimed by them at that time, because the same were incompetent, irrelevant and immaterial, and no part of the *res gestæ*."

Ninth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington, to-wit:

"The court erred in allowing the defendant in

error to introduce the evidence to show that certain alleged settlers on lands of whom the plaintiff in error Stone purchased timber had since abandoned said lands. Said evidence was objected to and admitted by the court, the same being immaterial, incompetent, and irrelevant, and tended to induce the jury to believe that the acts of the said settlers after they had sold the timber to the plaintiff in error were proper for their consideration."

Tenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The Court erred in refusing to give the following instruction at the request of the defendant: 'In the case of The United States *vs.* John H. Stone, et al., the defendant John H. Stone prays the court to instruct the jury as follows: There is no proof of the alleged partnership charged in the complaint, and the defendants are therefore entitled to a verdict.'"

Eleventh. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in refusing to give the following instruction at the request of the defendant: 'When a pre-emption or homestead filing has been made by a settler duly qualified to make the same, the effect of such action combined with an actual personal settle-

ment on the public land so filed upon, is to sever such land so claimed from the mass of public lands and, subject to the loss of the right of claimant by failure to comply with the subsequent conditions of the law, the settler becomes the owner of the land, and except as between him and the Government, he is entitled to exercise all rights of owner.'"

Twelfth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in refusing to give the following instruction to the jury at the request of the defendant: 'The legal presumption arising from the lawful entry made upon land by a claim under the law as a homestead or pre-emption and occupation as such is, that the claimants acted in good faith, and the burden of proving bad faith and attempting to defraud the Government is upon the plaintiff.'"

Thirteenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in refusing to give the following instruction to the jury, as requested by the plaintiff: 'If the jury find that the claimants of the land, who sold timber cut from the land to the defendant Stone, were at the time residing upon it, having claimed it under the homestead and pre-emption laws, and were

so improving their land as to indicate to the jury that they intended to acquire title by compliance with the law, and the sale of the timber was made under such circumstances as to lead the purchaser to believe that the parties selling it were acting in good faith, then such sale was lawful and the plaintiff would not be entitled to recover for the timber so sold.' "

Fourteenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in refusing to give to the jury the following instruction at the request of the defendant: 'The fact that the claimants to land under the homestead and pre-emption laws after occupation for a time abandoned the land is not alone proof that they intend to defraud the Government, although in the meantime they had cut and sold timber from the land during their occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that the claimants of the land were acting in good faith at the time they sold the timber—the purchaser had no reasonable grounds to believe otherwise, then such sale would be lawful.' "

Fifteenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in its charge to the jury wherein it stated: 'I have decided that adjacent lands means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroads mentioned as the lands in Kootenai County, Idaho, where it is claimed these railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of the claim from your consideration and relieves you from any consideration in regard to it,' because the Act of Congress of March 3, 1875, under which the defendant sought to justify the cutting of the ties in question, contemplated and authorized the taking of ties under the circumstances and conditions established in this case, and timber cut was shown to be the nearest available timber to the localities where it was used, and because there being no rule fixed by the statute permitting timber and material to be used in construction as to the distance it may be so taken, it becomes necessarily a question to be determined by the circumstances, and is therefore a question depending on the proofs, and consequently a question to be determined by the jury."

Sixteenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington, to-wit:

"The court erred in that part of its instruction to the jury in which it said: 'As to all of the lands in which the title is in the United States, the timber and

trees that are standing and growing thereon are part of the land, and the Government has title to those trees the same as in the soil,' because it is not a correct exposition of the law, that the Government has title to the timber upon the land because it has not parted with the legal title to the soil, and said instruction, in the connection in which it is expressed, tended to injure the defendants before the jury."

Seventeenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment to that court from the District Court of the District of Washington:

"The court erred in that part of the instruction in which it said to the jury: 'A settler who takes up a claim on public lands to perfect his right to it, until he has perfected his right has no right to cut timber except so far as is necessary and reasonable to prepare so much of the land for cultivation as he intends to cultivate. A man of limited means goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut timber off the few acres that he intends to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plow shall follow the axe, and that the entire forty acres shall be put to use for purpose of cultivation in such manner as the farmer makes use of land that is tillable land. The balance of timber on the 160 acres, if it is a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and

should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith; but a man whose primary purpose is to cut timber on a piece of land is no more authorized to go out and cut that timber by reason of his having filed on that land in the Land Office a declaration of his intention to take the land under the preemption law than if he goes and cuts it without filing any declaration. * * * He has no right to cut down and sell the timber on other portions of the land which *he is not intending to immediately* put into cultivation,' because the same is a restriction upon the rights of the settler, is a misconstruction of the law, and in violation of the privileges granted to the settler."

Eighteenth. The Circuit Court of Appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in giving any instructions to the jury on Sunday, because it had no power to do any judicial act save to receive the verdict and discharge the jury, and all such instructions given to the jury were without anthority."

Nineteenth. The Circuit Court erred in sustaining the ruling objected to in the following assignment of error to that court from the District Court of the District of Washington:

"The court erred in entering any judgment against the defendant upon the verdict, because the verdict was against law."

Twentieth. The Circuit Court of Appeals erred in affirming the judgment, because the same is against law.

Argument.

I.

The question at the threshhold of this investigation in this court is:

Had the District Court of the United States for the District of Washington jurisdiction of this case? If it had not, we need not proceed further in the inquiry as to the proceedings at the trial in that court.

The action is trespass and for damages in that the defendant Stone is alleged unlawfully, wrongfully and wilfully, to have cut from certain lands of the United States, particularly described as lying in certain townships and sections of the public lands, in the county of Kootenai, State of Idaho, between dates specified, and of a value alleged, certain timber trees—and converted the same to his own use. (Transcript, pages, 1-2.)

No exception to the action of the court, in which the suit was brought entertaining jurisdiction of the

case is found in the record, but as the question is jurisdictional, the omission is immaterial.

Trespass is a local action and the same must be laid in the district where the lands lie upon which the trespass is alleged to have been committed.

United States *vs.* Scheeler, 6 McLean, 28.
McKenna *vs.* Fink, 1 How., U. S. Rep., 241.
N. I. R. Co. *vs.* M. R. C. Co., 15 How., U. S. Rep., 233.
Huntington *vs.* Attrill, 146 U. S. Rep., 669.
Ellenwood *vs.* M. C. Co., 158 U. S., 107-8.
Cragin *vs.* Lovell, 88 N. Y., 258.
Dodge *vs.* Colby, 108 N. Y., 445.
Eames *vs.* Prentice, 8 Cush., 337.
1 Chitty on Pleading, 242.
Warren *vs.* Webb, 1 Taunton, 379.
Watts *vs.* Kinney, 6 Hill, 87.

Since the recent decision of this court in 158 U. S., it would seem that the point urged is conclusive of this case.

II.

The next error for review here rests upon the 1st, 2d and 3d assignments of error in this record. It involves the correctness of the rulings of the court on the demurrers of the plaintiff to the answers of the defendant, setting up as a bar, the judgment of the United States District Court for the District of Idaho,

in his favor in the criminal prosecutions which had been instituted against him—and also the ruling excluding the record of those proceedings as evidence upon the trial. The principle is the same in all these rulings so they may properly be considered together. The portions of the answer to which the demurrer was sustained, is as follows:

"That in the month of April, 1891, at a term of the United States District Court, held at Boise City, in the District of Idaho, whereat the Honorable James H. Beatty, United States District Judge, presided, and Fremont Wood, Esq., was attorney of the United States, a grand jury was regularly impaneled and sworn; the said trespasses and wrong complained of herein were then and there presented by the United States Attorney to said grand jury, for investigation, and such proceedings were then and there had and taken; that the said grand jury found and returned into said court true bills of indictment, in which each and all of the wrongs and trespasses complained of herein, were included, and this defendant was charged thereby with the commission of an offense against the penal laws of the United States, forbidding the cutting or removal of timber from the lands of the United States.

"On all the charges involving the acts of this defendant, as set forth in the complaint filed herein, this defendant was upon said indictments afterwards in said court tried and acquitted upon the trial before said court and jury, and the defendant was

adjudged innocent and discharged therefrom by the judgment of said court, all of which this defendant will verify by the record thereof, and the judgment of said court, upon each and every other charge preferred against him as aforesaid, was duly entered against said plaintiff in said proceedings, the issues therein being the same as are now presented in this action, and were each and all determined and adjudged in this defendant's behalf and against the plaintiff, all of which will appear by the record and proceedings of the court therein, which this defendant will produce.

"Wherefore this defendant alleges that the issues tendered by the plaintiff herein have been heard, tried and adjudged for the defendant and against the plaintiff, by a court of competent jurisdiction, and that said judgment and determination preclude the maintenance of this suit."

The demurrer admits these allegations. Do these answers constitute a bar? We insist that the bar is complete. The parties are the same, the issues are the same, the determination in the criminal proceedings covered every issue involved in this case and the judgment was in the defendant's favor.

It was necessary in the criminal action to prove affirmatively every fact that is alleged in the complaint in this action. The ownership and situs of the lands, the unlawful cutting or spoliation, the conversion of the timber, were no less essential in the civil than in the criminal case. Can it be pretended that these

issues were not tried in the criminal cases as fully as they must have been in this action?

If this be so, how can the same fact—or facts—be tried again in any other court, without a violation of the Seventh Amendment to the Constitution of the United States? The language of the Constitution is: "no *fact tried by a jury* shall be otherwise re-examined than according to the rules of the common law." Judge STORY observes, in Parsons *vs.* Bedford, et al., 3 Pet., 447-448, "that the only modes known to the common law to re-examine such facts were the granting of a new trial by the court when the issue was tried, or the award of a *venire facias de novo* by the appellate court."

Justices *vs.* Murray, 9 Wall., 278.

Whether we appeal to the general doctrine as to the conclusiveness of judgments between the same parties on the same cause of action, or to the provision of the Constitution referred to, the result is the same.

I admit that in this action for damages for the timber alleged to have been cut and converted, a less amount of proof is required for the plaintiff to have a recovery, than it would to secure a conviction on the charge of a misdemeanor committed by reason of the same acts. But the test of whether the judgment is a bar, is not whether the same evidence would be required in both cases as erroneously ruled by the

Circuit Court of Appeals but were *the facts, the issues* tried and decided, the same. There was an element in the criminal case, viz., the *intent*, which was not necessarily in this civil action, but the "facts" of the case, upon which the conclusion rested were identical.

The United States in this case had two remedies open to it. One was by a criminal prosecution for a misdemeanor in unlawfully cutting and converting its timber under section 2461, Revised Statutes, providing for fine in triple damages, the other a civil action for trespass and damages.

The Government by its officers adopted the remedy by prosecution. It indicted the defendant and took its chances of convicting him and securing damages to the amount of three times the value of the property alleged to have been taken. On trial it failed. It returns to the charge after it has once failed, and virtually says to the District Court of Washington, "We have sought through the court in the District of Idaho to secure a judgment of fine for three times the value of the timber which we charged the defendant with taking, that court has decided against us, now we wish to experiment with this court in the District of Washington, and we demand only the value of the timber which we charged the defendant with having taken.

It is admitted that a change in the *form* of the action does not affect the bar of the judgment ren-

dered at the first trial. The test was not as to whether it was a civil or a criminal one, in tort or contract—but were the facts tried and determined the same, and if they were ever put in issue, tried and decided *in any form*, they cannot be re-examined.

The District Court and the Court of Appeals seem to have held that because in the criminal prosecutions the plaintiff was required to prove the guilt of the defendant beyond a reasonable doubt or fail, and that a *less amount of proof* was required to make a case for plaintiff in this action, the judgment in the United States Court in Idaho, is no bar, and authority is cited of cases where the court, to ascertain whether a given judgment is a bar, inquires as to whether the same evidence would be required in both cases. This is a misapplication of the rule.

In the class of cases referred to, the court looks to the proof to ascertain *what the issues* were, but when the record itself discloses the issues, a resort to what proof is required is idle. It is by confusing the proofs to support issues when they are not disputable, with cases where the doubt as to what was tried and determined is to be decided by a resort to the proofs, that the court, we insist, lost sight of this distinction.

An inspection of the criminal charge will show that the plaintiff alleged its ownership of the lands, an unlawful trespass by the defendant, and the value. All these primary facts essential to the recovery in

this action were necessarily a part of the allegations in the penal proceedings. Can it be said that they were not "tried" in the first proceeding, because in that the plaintiff undertook in addition, to establish a criminal intent on the part of the defendant?

It may have been, that if the plaintiff had sued for the value of the timber alleged to have been taken in the first instance, it could have recovered; but if it put into its case an element essential to its recovery and tried all the facts involved, can it, because of having undertaken to prove more than it was able to do, say that the judgment does not bind it conclusively because it did not sustain its whole case? That would be to make the *amount* of testimony in a given case, the test whether it was or was not a bar to a future examination of the same question—when the conclusiveness of a judgment does not rest on the amount of testimony which was presented, but on the question of what facts were tried and decided. The facts as to those being public lands, that the plaintiff was the owner of the timber, and that the defendant cut and converted it, and its value, was all as fully involved in the criminal proceeding as in this one, and to permit the plaintiff to put them in issue as was done in that trial, and upon a failure to recover re-examine them in another form of action, is to violate fundamental principles.

The case of Coffey *vs.* United States, 116 U. S.,

442, is a case in which this court vindicates the law as we contend for it, and is, we think, identical with the case at bar.

The court, speaking by Mr. Justice BLATCHFORD, says:

"It is urged as a reason for not giving such (conclusive) effect to the judgment (which had been pleaded in bar) that the acquittal in the criminal case might have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence on the question of preponderance of proof there might be a verdict for the United States in the suit in view. (The civil action.)

"*Nevertheless the act or fact has been put in issue and determined against the United States*, and all that is embraced by the statute as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts substantially to the same thing with a difference only in the consequence following a judgment adverse to the claimant.

"When an acquittal in a criminal prosecution in behalf of the Government is pleaded or filed in evidence by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same. * * * * but upon this record, as we have already shown, the parties and the matter in issue are the same."

The doctrine is applied in the case of the United

States *vs.* One Distillery, 43 Fed. Rep., 846, 852. The cases on the general rule are so fully quoted in the record that I will not repeat them here.

III.

The court erred in denying the plaintiff's peremptory challenge to the juror Giffen.

The court consolidated the two cases for the purpose of the trial.

The plaintiff was entitled to six challenges in constituting that jury—he was permitted to exercise only three. (Transcript, page 27, folios 48, 49.)

This ruling tested by the decision of this court is —error.

Mutual Life Insurance Co. *vs.* Hillman, 145 U. S., 292.

IV.

The fifth and sixth assignments of error are based upon the refusal of the court to permit proof of the appointment of John H. Stone, the defendant, by the two railroad companies for which the ties were cut as their agent. These companies claimed that the timber was such as they were permitted to use in constructing their roads under the Act of Congress, granting rights of way, etc., to them. (Trans., pp. 39-41-42.)

The testimony offered was not only admissible to

show that the timber was lawfully cut, but if it was cut by a mistaken supposition that it was lawful, the measure of damages would be different, and the offered proof was proper to go in mitigation of damages.

Woodenware Co. *vs.* U. S., 106 U. S., 434.

We contend, further, under the facts which appear in this record, that the cutting of the tie timber was authorized by the Act of Congress, March 3, 1875. (Supplement to Rev. Stat., Vol. 1, p. 91.)

The Act authorizes materials for the construction of the roads to be taken from adjacent lands of the United States. The testimony shows that this was the nearest body of timber to those lines of road, and that it was resorted to from necessity. It was situated at a distance of 50 to 60 miles. The question in dispute turns upon the construction to be given to the word "adjacent" in the Act. The District Court held it to be a question of law for the court, and instructed the jury that the land where these timbers were cut were not "adjacent" to the lines of road on which the same were used. (Trans., pp. 127-8.)

In the case of The United States *vs.* the N. P. R. Co., 29 Albany Law Journal, 24, and in The United States *vs.* Chaplin, 31 Fed. Rep., 890, it was held that the word "adjacent" did not mean "contiguous" or "near" the line of the railroad, but was a matter to be determined by all the circumstances—a question

of evidence. In the case decided by Judge HOYT, the timber was cut in the Cascade range of mountains nearly 150 miles distant from the point where it was used. The timber was required to construct a bridge at Kennewick, across the Columbia river—requiring an extraordinary kind of timber almost impossible to find except in the forests of the Cascades.

In U. S. *vs.* Linde, 47 Fed. Rep., 297, the testimony showed that the timber was cut a distance of a hundred miles from the line of the road, and floated down by water to the point of use—and that a taking under such circumstances was not tortious—each of the judges holding the question to be one to be determined by evidence, of the situation and circumstances, hence a question for the jury.

We regard this ruling, by which the matter was taken from the jury and decided by the court, as error.

This Court has passed upon some cases which at the trial in the inferior court involved the construction of the Act discussed here, but the point did not arise in the cases as it was presented here, and I know of no direct decision upon it by this tribunal.

V.

The seventh and eighth assignments may be included in the same category of errors assigned.

The plaintiff was permitted, over the objections of

the defendant, to inquire as to the conduct of some of the settlers on the lands from which timber was purchased by Stone, *after* he had so purchased the timber; it being shown that several of them had abandoned the lands they had so settled upon.

This, we insist, was improper. The testimony showed that Stone, the defendant, had scrupulously refused to buy timber of any settler who was not *bona fide* occupying the land either as homestead or pre-emption settler, and that the timber was being cleared off for the purpose of reducing the land to cultivation. To make the subsequent conduct of these settlers evidence against the defendant, was to make him responsible for the acts of strangers over whom he had no control. It operated, by reason of the special circumstances of this case, with peculiar hardship on the defendant. When it was claimed, by the agents of the Government, that the cutting was illegal and a criminal offense, many of these settlers became alarmed, and fearing the consequences threatened in this cutting, in their terror at being threatened with fine and imprisonment, forsook their claims and fled the country. One notable instance was that of Stonebraker, whose improvements were worth, on the 160 acres he had taken up, not less than one thousand dollars—he had cleared and put in pasture from 10 to 15 acres of land—had it well enclosed—had a comfortable home surrounded with grass and

flowers—his good faith was made manifest by his works, and yet, rather than face the terrors of the law, he loaded his wife and children into wagons and fled entirely out of the country, going, as it was believed, to California.

To prove abandonment of their lands by settlers under such circumstances, as evidence of their bad faith, and make Stone responsible for it, is to punish him for their imputed bad faith. We think this evidence was distinctly inadmissible. It is in violation of the fundamental rule of evidence, and tended to the punishment of Stone vicariously for the sins of others.—This point is discussed later on.

VI.

The succeeding assignments of error are to the refusal of the court to give instruction requested by the defense, and in the giving of the said instruction to which exception was taken. These may be considered together, as all are based upon the two theories of the law entertained by the court and by defendant's counsel, respectively.

A perusal of the charge of the court will show that the jury were to accept the following as the law:

That while a person qualified by law to settle upon the public lands of the United States and acquire title thereto, was not a trespasser, he was not, until

he had performed all the acts necessary to entitle him to a transfer of the title, anything more than a mere tenant by sufferance—he was not the owner in any sense of the land so occupied, and if he at any time before his claim had ripened into a title, cut more timber than was necessary for use in its improvement—if, in the language of the court, "the plow did not follow the axe"—he was liable as a trespasser, and anyone dealing with him, whether in good faith or not, was subject to like consequences.

This view of the charge is very clearly supported by those paragraphs which have been excepted to and are found at page 70, folios 128-129 of the transcript. For instance, the following:

"Even a settler who takes up a claim on public lands intending to perfect his right to it, until he has perfected his right, has no right to cut the timber *except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate.*

"A man of limited means who goes on a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber off forty acres, it should be in pursuance to a definite plan that the plow shall follow the axe, and that the entire forty acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes use of land that is

tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith."

While there are some qualifications in the course of the charge, to render the rule laid down specific, the foregoing will fairly present the theory of the instructions.

We challenge this statement of the law, and while this court has been zealous in protecting the public lands from spoliation, we find no decision which can be said to support the position approved by the court below in this case. The requests to charge made in behalf of the defendant on page 99 (numbered 11th, 12th and 13th), present the views entertained by his counsel, and the 14th, 15th and 16th assignments of error contain specifically those objected to which the court gave.

Devoting myself to the initial point of the argument, I insist, the court erred when it declined to charge the jury that:

"When a settler, duly qualified, had filed his declaration as such, and had made an actual settlement upon the parcel claimed, that the parcel became

severed from the public lands, and that, subject to the loss of the settler's right by failure to comply with the subsequent conditions required by law, the settler, except as between himself and the Government, was entitled to exercise all the rights of an owner." (See Trans., p. 145).

Is not this the law? As long ago as 1828, Chief Justice MARSHALL, Jackson *vs.* Clarke, 1st Peters, 636-7-8, announced the principle that a survey (which was an initiatory step for acquisition of title, in the particular case) had the effect to sever the lands. To use the language of judge MARSHALL:

"Lands surveyed are as completely withdrawn from location as lands patented. * * * The illegality of the survey would not have been examinable by him (the subsequent claimant). It may be that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case, that under the Act of Congress it was not liable to location when the plaintiff's entry was made."

Again and again the courts affirmed that, as between third parties and the claimant, under the laws of the United States, the subsequent claimant is without legal standing.

Lessver *vs.* Price, 12 How., 76-7.

Chapman *vs.* School Dist. No. 1, Deady Rep., 113.

Gibson *vs.* Choteau, 13 Wallace, 72.

Belk *vs.* Meagher, 104 U. S., 284.

This last case is very familiar to the courts and the profession. Although it involved the subject of mineral land grants, it proceeds upon the familiar principle that a location upon lands by a party qualified to make such location according to law, withdraws the same from all third parties, and henceforth, except as to the right of the Government to resume its control by reason of the failure of the settler to comply with conditions subsequent, he is regarded as owner of the land.

If third parties dealing in good faith with a settler, are held to the consequence of his default, there can be no safety in dealing with anyone who is occupying land not yet patented.

If a third party took a lease, he would be liable to be sued by the United States as a trespasser and to account for rents and profits. If he cut timber for firewood, and his landlord should afterwards abandon the entry, the hired servant or tenant, though acting in perfect good faith, could be sued for damages.

To obviate difficulties like these it must, from necessity, be the law that a valid settlement made on the public lands, carries with it, as to third parties, during its continuance, though it may not culminate in acquisition of title, all the *prima facie* rights of a lawful possession and ownership. The land cannot be entered upon by any other. It will not pass by any but specific grant exercised by the act of sovereign power, and save that the title may be lost by failure

to comply with the subsequent requirements of the law, the settler has a perfect title in equity.

It is a grant upon condition—what was termed in the old law a base or conditional fee—perfect in the present, subject to forfeiture by subsequent default of the grantee. The principle stated in this request is sustained by the following authorities:

Wilcox *vs.* Peters, 13th Peters, 498.
Witherspoon *vs.* Duncan, 4th Wall., 2-10.
Hastings Railway Company *vs.* Whitney, 132 U. S., 357.
K. P. R. R. *vs.* Dunmeyer, 113 U. S., 535.
And others too numerous to cite.

Proceeding to other assignments under this head, we contend earnestly that it was error to refuse to say to the jury that:

"The legal presumption arising from a lawful entry made upon land by a claimant under the law as a homestead or pre-emption claimant, and occupation is, that the claimants acted in good faith and the burden of proving bad faith and attempt to defraud the Government, is upon the plaintiff."

Let it be borne in mind that the evidence showed that all the timber for logs taken by Stone was purchased by him from persons who were either homestead or pre-emption claimants, and then resided personally on the lands from which the same was taken.

This fact was admitted. It was sought to show by various circumstances that these claimants were not acting *bona fide* in claiming to be settlers, and that the purpose on their part was to cut and sell the timber, and then abandon the land after having stripped it of much of its value. Admissibility of the proof of subsequent abandonment by some of the claimants we have already remarked upon. But treating this and all other evidence introduced on that subject as admissible, we insist that the *burden of satisfying the jury on that issue was upon the plaintiff.* The court ruled otherwise, and the jury must have supposed that, unless the defendant proved to their satisfaction that the claimants did act in good faith, their duty was to find against him. The state of the case was this: Stone was sued for the value of timber claimed to belong to the United States. He showed, by way of defense, that this timber was purchased from certain settlers who had filed upon the land as homestead or pre-emption claimants, and were then residing upon the same. Unless they were acting in bad faith and in violation of the law the defense was good. That evidence to establish fraud and bad faith, must come from him who makes the charge is fundamental, and that it was admissible we made no question. For refusing to admit such testimony, U. S. *vs.* Serenson, Circuit Court of Appeals, Vol. IV, 332, reversed the lower court, and said that the

United States had the right to prove that the settler did not enter upon the land for settlement and improvement for his own benefit, but for the purpose of acquiring the land for a logging company, and under an agreement with it to convey it. Recognizing that the United States had the right to introduce this class of evidence, we made no objection to it, but we insist that the legal presumption that a man who files a claim to land and enters upon its occupation and improvement, is one that calls upon anyone asserting his purpose to be to defraud, to make out the charge by testimony sufficient to overcome the presumption in his favor. In no tribunal is fraud presumed except upon proofs, and the settler who goes upon the public land in obedience to the invitation of the Government is no exception to the rule. It may be a violent presumption to say that all men are honest, as it is that all men are innocent, and yet such is the law. Neither crime nor dishonesty is ever assumed—it must be proved. Why then is it that in a prosecution for unlawfully cutting timber from the public lands, the burden is shifted to the defendant and the latter is called upon to prove his innocence?

The allegation in the complaint in this case that the timber was "unlawfully" cut required the plaintiff to negative the defense, which was made, by affirmative proof.

1st Greenleaf's Ev. (14th Ed.), §§ 34-35.

In section 81, Greenleaf's Evidence, the learned author states the rule as follows:

"So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; *or fraud, or the wrongful violation of actual lawful possession of property*, the party making the allegation must prove it, for in these cases the presumption of law, which is always in favor of innocence, and quiet possession, is in favor of the party charged."

Kline *vs.* Baker, 106 Mass., 61.
Phelps *vs.* Cutler, 4 Gray, 137.

The next request by defendant, which the court refused to give (12th assignment of error), we regard as one that we have the right to have go to the jury. It is not denied, we apprehend, that a settler may cut and dispose of timber on lands of which he has not yet acquired title. The right to do so depends upon his being a *bona fide* settler. If we are right in the assumption that his purposes are presumed to be lawful, then one who deals with him under circumstances that do not suggest suspicion, or invite doubt of his purpose, must be protected. That is the meaning of this request. We submit the refusal to give it or any that substantially covered the same idea, was a denial of our just rights.

All of the requests to charge on behalf of the defendant, to which we have excepted, are parts of an entire theory which we understand the court to have

repudiated. An examination of the charge given by the court, as a whole, will enable this court to judge of the general theory upon which this case was placed before the jury, and more clearly apprehend the justice of our criticism upon the parts to which we except.

Following this I proceed to other portions of this charge on this same part of the case.

The court there laid down the general rule that, as to all the lands in which the title is in the United States, the timber and trees are part of the soil, and the government title in those trees the same as in the soil. In a limited sense it is true, that the title to the soil carried with it title to everything affixed to it, whether it be timber, structures, or any other kind of fixed property. But the proposition as put to this jury under the circumstances of this case, was, we think, without most important qualifications and limitations, calculated to mislead the jury, and is incorrect. It was admitted that the title of the lands from which the timber was taken was in the United States. At the outset of the case this fact was understood, and the defendant further admitted, that a certain quantity taken from those lands, was disposed of by him. But the charge in the complaint was that this timber was taken *unlawfully*, and the gist of the action depended upon the proof of this allegation. If the instructions of the court were construed liter-

ally by the jury, the plaintiff's case was made out *prima facie* by our own admission. If the burden was upon the defendant when he admitted that the timber was cut upon certain sections of land, the patent of which had not yet passed, then the defendant was put upon to prove, not only that these lands had been occupied by settlers, but that they had acted in good faith and committed no fraud or wrongful act, or submit to a judgment for the value of the timber. This was the apparent theory of the court, and the one we combat. It is conceded by the court in the instructions given, that it would not necessarily follow that because the title to the land from which the timber was taken is in the plaintiff, it had a right to recover the value of the timber. The right to cut timber by the occupant, under certain restrictions laid down by the court, was affirmed. This being true, and it being necessary to show the unlawful character of the cutting, and as wrong or fraud is never presumed, without proof, it must follow that before a recovery can be had the *plaintiff must show affirmatively* the wrong or fraud, which is the gist of its right to recover.

Whenever it appears from the plaintiff's own proof that the land has ceased to be public by having been severed from the mass of the public domain by a lawful settlement, its absolute right to the soil and timber ceases. It becomes a qualified and modified right

subject to be wholly and totally divested, and the settler by complying with the further requirements of the contract under which he entered, is the real and true owner of the land from the date of his entry. This is the law as expounded in innumerable decisions. It is, therefore, untrue in the general and unrestricted sense in which the court below expressed the rule in these instructions, that where the Government has the "title to the soil it also has the title to the trees." It is incorrect to say that because the Government has the legal title, that it is the owner, in such a state of the case; it has the title precisely as any other owner of the land, who makes a contract to alienate it upon condition, and who places the grantee in the contract in possession on agreement that he will fulfill the contract to acquire. If A agrees to sell land to B, upon the promise from B that he will pay for it at some future time, and puts him in possession, and B while in the performance of the contract, in good faith disposes of some of the proceeds of that land, can A because he has not yet actually conveyed the land, maintain an action against C, a third person for these proceeds?

The instruction which we asked would permit A to recover if any fraud in B was shown of which C the third party was cognizant, and surely this was the utmost that could be claimed. A having only a qualified interest, for the purpose of compelling B to per-

form his contract, must show that a violation of that contract was committed by B, and that C *was a party to it or knew of it*, before he could claim that he was injured. The equitable title vested in B by the contract would, until some act by B should be shown in fraud of his agreement, not only protect him, but all who dealt with him in good faith. These principles, so fundamental as to be hardly the subject of candid dispute, were entirely ignored by these sweeping instructions, which laid down the broad and unqualified rule that the "legal title to the soil made legal title to the timber." This was emphasized by the unequivocal declaration (16th assignment of error) that a man is "no more authorized to go out and cut that timber by reason of his having filed on that land under pre-emption law, than if he goes out and cuts it without filing any declaration." We contend that this cannot be the law. If a man goes upon the lands of the United States, and without effort or movement to obtain title cuts timber, he is a trespasser; but the citizen, who solemnly files, by invitation of the Government to do so, his declaration to acquire a particular parcel of land, complies with the conditions imposed upon him and then cuts timber, is not a trespasser even *prima facie*. The qualification inserted in this instruction "that if it is the primary purpose" of the man to cut the timber instead of to cultivate the soil from which it is cut, does not in the

least relieve the instruction of its objectionable features. The Government does not scrutinize the "primary purposes" of the settler in filing upon the lands. In fact there are lands, and large areas of them, which are valuable, attractive and desirable for the timber almost exclusively. The "primary purpose" of the honest settler is to obtain this timber. But for it the land would be perhaps comparatively worthless. Its desirableness consists in the fact that it contains the timber. Is it for that reason exempt from acquisition, because the "primary purpose" is to secure the timber?

In Lytle *vs.* State of Ark., 9 How., 333, Judge McLEAN says:

"The claim of a pre-emptioner is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right, but when covered by the law it becomes a legal right *subject to be defeated only by failure to perform the conditions annexed* to it. It is founded in an enlightened public policy rendered necessary by the enterprise of our citizens," etc.

In its anxiety to preserve the timber lands from fraudulent and piratical spoliation, under the mask of the law, the court has, we insist, gone entirely beyond the law and limited the privileges of the settler in a way that the law will not sustain.

The Government, permit us to say, does not impute

wrong motives in advance to its settlers, and it does not institute any inquisition into their purposes. It exacts certain things to be done, and until it appears that a fraudulent purpose, instead of an honest one, is controlling the claimant, he is assumed to be proceeding lawfully. Where in the law, either homestead or pre-emption, is there any reservation that a settler "has no right to cut down and sell timber on other portions of the land which he is not intending to immediately put into cultivation," as stated by the court, or where in the law is to be found any warrant for saying that when the settler has cleared the portion of the land which is tillable that "the balance of the 160 acres, if it is a claim covered with timber, *should remain as a preserve, a timber preserve*, for the future benefit of the land, and *should be removed only so fast as the settler finds it necessary to remove it in order to put in cultivation the lands he means to cultivate, and intends to cultivate in good faith.*"

We respectfully ask, in what portion of the land laws of the United States are any such limitations upon the rights of the settler to be found. The Government does not undertake to enforce any particular system of farm management, and while a prudent man looking to the future and realizing that a "timber preserve," if he intended to preserve the timber for some particular use, would be wise, the same man might under other circumstances believe, and very

truly, that to clear every tree from the soil, and devote it to a sheep walk, would be more wise and profitable. Does the Government undertake to dictate in such matters? Not at all.

Suppose a piece of public land should be destitute of timber, as much of it is known to be, but produces a large quantity of natural grass good for hay. Its chief value consists in this crop of grass. If a settler enters upon it and mows and carries to the market this product of the soil, he is taking that which belongs to the Government, under the rule laid down in these instructions, and the purchaser would be liable for the value just as much as if he had purchased timber or stone of the settler.

Murphy *vs.* S. C. & P. R. Co., 8th N. W. Rep., 320; 55 Iowa (and cases cited).
U. S. *vs.* Gear, 3 How., U. S., 121.
U. S. *vs.* Briggs, 9th How., 351-805.
Ward *vs.* Andrews, 2d Chitty, 636.

The whole theory of "the plow following the axe," which is only a brilliant euphemism of Judge DEADY'S expressing a good rule in husbandry, is outside of any requirement of the law, and is an attempt to make an imperative rule where the statute has made none. The true doctrine is, that the entire circumstances and conditions surrounding any given case of settlement should be considered in order to determine, when

the question arises, whether the settler is in good faith endeavoring to comply with his contract with the Government, and no isolated fact can be treated as conclusive of that question. A settler may cut every stick of timber off 160 acres of land, without leaving a standing tree, and do it before he reduces ten acres to cultivation, and the fact will not itself prove that he is trying to defraud the Government. The purpose for which he intends to use the land may be such that this very course would be evidence of his good faith instead of his bad faith. To make the conduct specified in the instructions conclusive of his bad faith would, in many instances, inflict the most grievous wrong on honest settlers, or hamper them in the most valuable improvements looking to the future of the land. The instruction which the court was asked to give (13th assignment of error), that the jury should judge of the intent of the parties by all the circumstances surrounding each case (of sale of timber), and if these circumstances satisfy the jury that the claimants were acting in good faith at the time they sold the timber, and the purchaser had no reasonable ground to believe otherwise than such sale would be lawful—embodies, we insist, the law applicable to the facts of this case. The chief vice of these instructions consists in treating certain isolated facts as themselves proof of an attempt to defraud the Government instead of regarding them

as evidence tending to show bad faith when considered in connection with the entire evidence in the case.

First, they put upon the defendant *the burden of establishing good faith, not only in himself*, but on the part of those from whom he bought the timber, and then made certain specific acts proof of fraud, which were only proper to be considered as tending to show fraud, and then by restricting the rights of the settler to a line of improvement which the law does not impose, and visiting the consequences upon one, who, whatever the bad faith of his vendors may have been, was acting in unquestioned good faith, and paid the market price for every stick of timber purchased by him. The instructions confounded the distinction between evidence and proof, and extorted a verdict which is against law and a grievous wrong to this defendant.

VII.

The remaining error is to the action of the court on Sunday.

There is no statute on the subject in the District of Washington either State or Federal. The question must be determined upon the common law as recognized by the courts of the United States.

The bill of exceptions shows that on Saturday, the 22d day of April, the court instructed the jury in this case, and they were sent out for this delibera-

tion. No agreement having been arrived at or reported, on the next day, Sunday, about two o'clock, the judge of the court directed the bailiff to bring the jury into the court, and the attorney of the United States, and the defendant's attorneys, having been notified, also appeared, and the court then proceeded to give the instructions to which we except. The exception raises the single question as to the power of the court to transact business on that day. The exception concedes that the court might have received a verdict and discharged the jury. We admit that at the time we supposed the law to be so, and that this was the rule of the common law. We are not satisfied that the concession was right. And we submit that the proposition upon which the objection is based is clearly the law.

Chief Justice PARKER, in Pierce *vs.* Atwood, 13 Mass., 347, said:

"By the common law of England, it is certain that Sunday is *dies non juridicus*, and that only order, decree or judgment of any court rendered on that day would be void. This seems to be clearly settled in the case of Swaner *vs.* Broome, which was cited in the argument for plaintiff, and in which Lord MANSFIELD gives us an historical account of Sunday, and proves that *no judicial proceedings had on that day can be valid.*"

Van Vetchen *vs.* Paddock, 12 Johns., 181.

At the date of this decision the statute of New York, copied into most of the other states, permitted the court to receive a verdict and discharge a jury on Sunday. It was this practice which led the attorneys of the defendant to suppose that it was the rule of the common law, and misled them into making the exception in the form in which it appears.

In Butler *vs.* Kelsey, 15 Johns., 178, where a trial was continued on Saturday night into the morning of Sunday, when the jury retired and the verdict was returned at four o'clock of that day, the judgment was reversed by a unanimous court; and in Houghtaling *vs.* Osborne, the verdict was received on Sunday, and a judgment entered the same day, and it was set aside as void, the court observing:

"It was proper to receive a verdict, presuming that the jury was impaneled before Sunday commenced, but it was illegal to enter the judgment on Sunday."

In Strong *vs.* Elliott, 8 Cowan, 27, SAVAGE, C. J., said:

"Sunday is stated in all the books to be *dies non juridicus—not made so by statute*, but by a canon of the church incorporated into the common law. * * * * *By the common law then it appears that all judicial* proceedings are prohibited on Sunday."

This case held that the making of an award on Sunday by arbitrators was void, and refused to allow

the statutory rule in regard to receiving verdicts of juries, to be applied to it.

Are instructions to a jury judicial acts? Will anyone dispute it? No more solemn judicial act can be performed than that of giving instructions to a jury. The entry of a judgment or an order is not more so. It It will not bear argument. The instructions themselves were prejudicial to the defendant, and we might well have excepted to the matter of them on other grounds than the power of the court to give them. To call a jury together, after they had been twenty-four hours in deliberation, without any request from them, or either of the parties, and proceed to instruct them that, for reasons *affecting the trial of other cases then pending*, they would be required to make certain special findings of fact, tended strongly to influence the jury against the defendant. We are aware that in United States courts the judges are at liberty to express their opinions upon the facts, and that exceptions do not lie to such a course, but instructions that imply that it is the duty of the jury in the case before them to make certain findings, are not without undue weight, and we had to accept the consequences in this case. We submit that the exceptions taken on this last ground must command the favor of this court.

Respectfully submitted,

JNO. R. McBRIDE,
Attorney for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 265.

JOHN H. STONE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Brief for Plaintiff in Error on the Jurisdiction of the Circuit Court.

C. W. BUNN,
Of Counsel.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 265.

JOHN H. STONE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit. The action is an action of trespass brought by the United States against John H. Stone in the Circuit Court of the United States for the District of Washington. The declaration or complaint alleges that the United States was at the times referred to the owner of certain lands (describing them by government subdivisions), "all of said lands lying and being in Kootenai County, State of Idaho." (Record, p. 1-2.) "That between August 1st, 1888, and November 1st, 1890, the said John H. Stone did unlawfully, wrongfully and willfully cut from the said lands 77,441 trees." (Record, p. 2.) The declaration then alleges that Stone converted the trees so cut and the railroad ties and timber made therefrom to his own use. There is but one count in the complaint and but one cause of action stated. The

United States recovered judgment for the sum of nineteen thousand dollars damages, which judgment was affirmed in the said Circuit Court of Appeals, and to review the same John H. Stone sued out this writ of error.

ASSIGNMENT OF ERRORS.

Errors are assigned in the Record, pp. 97-101.

ARGUMENT.

We submit that the Circuit Court of the United States for the District of Washington had no jurisdiction of this cause of action. The point was not made in the Circuit Court nor in the Circuit Court of Appeals, but has not for that reason been waived, being a point which goes to the jurisdiction of the court over the subject matter of the action.

The declaration cannot be distinguished from that considered by this court in *Ellenwood vs. Marietta Chair Co.*, 158 U. S. 105. It was settled in that case that, by the law of England and of those states of the Union whose jurisprudence is based on the common law, an action for trespass upon land, like an action to recover the title or possession of the land itself, is a local action and can only be brought within the state in which the land lies. It was also decided that where the declaration contains but a single count alleging a continuing trespass upon the land by the defendant and a cutting and conversion of the timber growing thereon, this allegation is of a single cause of action of which trespass upon the land is the principal thing, and conversion of the timber incidental only; that the action can not therefore be sustained by proof of the conversion of personal property without also proving the trespass upon real estate.

The common law prevails in Washington. Sec. 108, Vol. 2, Hill's Annotated Statutes and Codes of Washington reads as under:

"The common law so far as it is not inconsistent with the constitution and laws of the United States, or the State of Washington, nor incompatible with the institutions and conditions of society in this State, shall be the rule of decision in all the courts of this State." (Feb. 24, 1891.)

Notwithstanding the point was not suggested in this action to the Circuit Court nor to the Circuit Court of Appeals, it is available here. In the Ellenwood case the defendant filed an answer denying the allegations of the amended petition and did not raise the question of jurisdiction either by demurrer or plea. The defendant by its general answer therefore waived in that case every objection which could be raised to jurisdiction over the person. No more than that has been waived in this case. The objection is evidently a defect in jurisdiction over the cause of action, the subject matter. There is no reason why a foreign court in whose territory the defendant is found has not complete jurisdiction, so far as the defendant's person is concerned, to entertain an action against him for trespass on real estate lying in a foreign country. The reason why the action cannot be maintained is that it involves a trial of the title to foreign land. As this court said in the Ellenwood case:

"The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The Circuit Court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea."

For the reason above assigned the judgment of the court below should be reversed with directions to dismiss the complaint.

C. W. BUNN,
Counsel for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

JOHN H. STONE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 265.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

POINTS AND ARGUMENT.

I.

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON HAD JURISDICTION OF THIS CASE.

It had jurisdiction of the person of the defendant, and the action being a transitory one, this was sufficient.

The argument for plaintiff in error, as set out on pages 16 and 17 of the brief, proceeds upon the idea that this

is an action for trespass mere, and that it is governed by the case of *Ellenwood* v. *M. C. Co.* (158 U. S., 107–8).

The complaint is for a conversion and not for a trespass. The first paragraph sets forth the ownership, description, and situation of certain lands. The second paragraph recites the unlawful and wrongful cutting of timber from said lands. It further avers that after the timber was cut the same was wrongfully and unlawfully converted. The third and fourth paragraphs merely set forth the value. The gist of the action is the fifth paragraph, which is as follows:

> That the plaintiff was the owner of all of said logs out of which said ties were made when cut as aforesaid, and was the owner of the same after it had been converted into ties; and the plaintiff was the owner of all of said logs which were manufactured into timber as aforesaid by the Spokane Mill Company, and was the owner of all of said timber after it was manufactured as aforesaid, all of which said ties and timber the defendant unlawfully, wrongfully, and willfully converted to his own use and benefit. (Rec., p. 3.)

The sixth paragraph is as follows:

> That said trees when converted into timber were of the reasonable value of $153,121.75, and that the trees when converted into railroad ties were of the value of $84,161.70.
>
> Wherefore, plaintiff demands judgment against defendant for the sum of $237,283.45, and for costs and disbursements of this action. (Rec., p. 3.)

Thus the suit is for the conversion of the timber, which was of the reasonable value of $153,121.75, and of the ties, which were of the value of $84,161.70.

It is manifest that judgment is sought, not for the trespass, but only for the conversion after the severance. (Rec., pp. 1–3.)

In the Ellenwood Case the court said:

> The original petition contained two counts—the one for trespass upon land and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. (*McKenna* v. *Fisk*, above cited; *Williams* v. *Breedon*, 1 Bos. & Pul., 329.)
>
> But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing and the conversion of the timber was incidental only, and could not, therefore, be maintained by proof of the conversion of personal property without also proving the trespass upon real estate (p. 108).

In this case the paragraphs setting out the description of the land and the cutting are mere recitals of ownership. They might have been omitted and the declaration would have been good.

If a suit like this, the right to recover in which is predicated solely upon the conversion, can not be maintained, then persons can depredate on Government lands and move to another State, and, no matter how wealthy, secure perfect immunity from a civil action. They only run the risk of an indictment, which carries with it the

chances of getting clear unless the case be made out beyond a reasonable doubt.

In *Schulenberg* v. *Harriman* (21 Wall., 44, 64) it was held that while timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued, as previously, the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords in *other* cases of the wrongful removal or *conversion* of personal property.

The above case was followed on this point in the case of *Southern Pacific Railroad* v. *Lewis* (162 U. S., 366, 374), which was a suit against a railroad to recover damages for the destruction by fire of certain logs cut by the plaintiff on Government land, in which the plaintiff failed to recover because the court held that the title was in the United States, and therefore plaintiff showed no right to recover.

The following cases hold that trees, so soon as severed from the soil, become personal property, and an action of trover will lie for the wrongful conversion thereof.

Moody v. *Whitney* (34 Me., 563).
Whidden v. *Seelye* (40 Me., 247).
Moores v. *Wait* (3 Wend., 104).

II.

THE JUDGMENT IN THE CRIMINAL ACTION IS NOT A BAR TO THIS SUIT.

The parties are the same, but the facts necessary to sustain both actions are not the same. This being a suit

for conversion, recovery could not be had without proof of any unlawful cutting upon the part of the defendant. The ownership of lands and the cutting of timber were mere facts going to establish the ownership of the timber and the ties in the condition they were in when the conversion took place. The cutting might have been by persons other than Stone, and yet there could be a recovery in this case on proof of ownership in the United States and the wrongful taking to his own use by the defendant.

The indictment under which he was acquitted alleged that he "did then and there unlawfully, willfully, and feloniously cut and remove and cause and procure to be cut and removed from said lands 50,000 timber trees then and there being and growing upon said lands, said timber trees consisting of pine, etc., * * * with the intent then and there and thereby on the part of him, the said John H. Stone, to export, dispose of, use, and employ said timber trees, cut and removed and caused and procured to be cut and removed from the aforesaid public lands of the United States as aforesaid, etc." (Rec., pp. 25, 26.)

Thus to sustain the indictment it was necessary to prove not only the removal, but the unlawful cutting and removing.

In the brief for plaintiff in error counsel admits that—

> It was necessary in the criminal action to prove affirmatively every fact that is alleged in the complaint in this action. The ownership and situs of the lands, the unlawful cutting or spoliation, the conversion of the timber were no less essential in the civil than in the criminal case (p. 19).

> The best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the present and the former action. If the identity of the evidence be found, it will make no difference that the form of the action is not the same. * * * On the other hand, if different proof be required to sustain the two actions judgment in one of them is no bar to the other. If the evidence in the second suit, between the same parties, is sufficient to entitle the plaintiff to a recovery, his right can not be defeated by showing any judgment signed against him in any action where the evidence in the present suit would not, if offered, have altered the result. (1 Freeman on Judgments, 4th ed., sec. 259.)

Cited with approval in *Cromwell* v. *Sac. Co.* (94 U. S., 351); see *Taylor* v. *Castle* (42 Cal., 371).

The case of *Coffey* v. *United States* (116 U. S., 442) is relied on by plaintiff in error as conclusive of this question, but it is not so in any sense. In that case the court said:

> The information is founded on sections 3257, 3450, and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts, and intents averred in the information in this suit. The question, therefore, is distinctly presented whether such judgment of acquittal is a bar to this suit.

In that case it was held necessary to enforce a forfeiture in a civil case that the same fraudulent acts, attempts, and intents to defraud should exist, which were necessary

for conviction in the criminal information, and therefore there was an identity between the two suits. In this case, however, there is a radical difference, in that there may have been a conversion without any wrongful intent, or without any trespass upon the Government's lands. In the prosecution in Idaho, if the Government failed to prove the averment in the indictment that the timber was cut, or procured to be cut, by the defendant, the prosecution necessarily failed, whereas this fact, which was the gravamen of the criminal proceeding, would be entirely immaterial in this case. If it were proved that the timber was cut by another person upon Government land, the mere fact of establishing ownership by identifying the timber would be sufficient, taken in connection with the subsequent conversion by the defendant.

In the Coffey Case both actions were penal and were identical in their elements. If there had been a conviction in the criminal action, there could not have been a forfeiture in the civil suit. (*United States* v. *One Distillery*, 43 F. R., 852.) If Stone had been convicted in the criminal action, he, nevertheless, would have been liable in a civil suit for conversion, which is not founded on a statute penal in its nature, but rests upon a common-law right.

The brief for plaintiff in error seems to proceed upon the idea that the two cases are sought to be distinguished on the ground that criminal intent must be proved in the criminal while it is not necessary in the civil case, and upon the further ground that the quantum of proof must be more in the criminal case. This is not the true ground

of distinction. The distinction rests upon the difference between the essential facts necessary to sustain the several actions.

In the Coffee Case the court said:

> Nevertheless the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant (p. 443).

While that was true of that case, it is not true of this case, for the prosecution would necessarily have broken down for failure to prove the unlawful act on the part of the defendant, but such a failure would cut no figure in this case.

III.

IT WAS NOT ERROR TO DENY THE PLAINTIFF IN ERROR THE PEREMPTORY CHALLENGE OF THE JUROR GIFFIN.

The contention of plaintiff in error is, that because two cases were consolidated in which he was a defendant he was entitled to six challenges, and was permitted to exercise the right to challenge only three.

The record shows that "the defendant Stone exercised his challenges upon said panel to the number of three" (Rec., p. 27), and that thereafter "the defendants Stone and Noonan peremptorily challenged John Giffin,

one of the jurors, upon the ground that the defendants were entitled to challenge peremptorily in each of the cases on trial three jurors, and that they desired to exercise said challenge upon said juror in the said cause, No. 89, on behalf of said defendants." (Rec., p. 27.)

It does not appear whether Noonan had already had three challenges or not. If he had not exercised this right he had a right to three challenges and no more. Stone had already exercised his right as to three. If anyone was prejudiced, it was Noonan, and not Stone, and Noonan is not here complaining. The brief for plaintiff in error (p. 25) relies upon the case of *Mutual Life Ins. Co.* v. *Hillman* (145 U. S., 292) to sustain his claim to six challenges, upon the theory that there are two consolidated causes in which he was a defendant. That case is no authority for any such contention. That case only decided that each defendant in consolidated causes was entitled to three peremptory challenges, and not that each defendant was entitled to three peremptory challenges for each of the causes thus consolidated.

It appears from the record that the right to these three challenges was sought to be exercised in case No. 89. The right was exercised in this case, which was No. 86. (Rec., p. 27.) This is the only case before this court. In No. 89, in which the challenge was refused, there was a verdict for $3,000 (Rec., p. 18), but this verdict was set aside. (Rec., p. 21.)

HOLMES CONRAD,
Solicitor-General.